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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Qwest Communications International Inc.'s Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming	)	WC Docket No. 02-314

COMMENTS OF AT&T CORP.

David W. Carpenter
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

Mark E. Haddad
SIDLEY AUSTIN BROWN & WOOD, L.L.P.
555 West Fifth Street
Los Angeles, California 90013
(213) 896-6000

David L. Lawson
Mark D. Schneider
R. Merinda Wilson
James P. Young
C. Frederick Beckner III
Richard E. Young
Christopher T. Shenk
SIDLEY AUSTIN BROWN & WOOD, L.L.P.
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

Mark C. Rosenblum
Lawrence J. Lafaro
Richard A. Rocchini
900 Route 202/206 North
Room 3A227
Bedminster, NJ 07920
(908) 532-1839

Mary B. Tribby
AT&T Communications of the Mountain States, Inc.
1875 Lawrence Street, Room 1575
Denver, Colorado 80202
(303) 298-6163

Attorneys for AT&T Corp.

October 15, 2002

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COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T") respectfully submits these comments in opposition to Qwest's application for authorization to provide in-region, interLATA services in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming.[1]

INTRODUCTION AND SUMMARY

Qwest has again chosen shortcuts and gimmicks over a serious and responsible effort to meet its checklist, separate affiliate and public interest burdens. That was a reckless approach to its first two multi-state section 271 applications. It is inexcusable the third time around.

The record in the prior proceedings identified for Qwest precisely what it needed to do to fix its discriminatory operations support systems, its inflated network element rates, and its unlawful interconnection policies so that they would satisfy the competitive checklist requirements. Qwest's withdrawal of the first two applications provided it with yet another opportunity to address its admitted secret deals discrimination in the only manner that could support a reasoned Commission finding that this pervasive discrimination has finally ended – *i.e.*, by providing verifiable *evidence*, rather than bare assertions, that all of its written and oral interconnection agreements are now public and generally available. And Qwest had the opportunity to address the underlying *cause* of its inability to satisfy the accounting and other section 272 safeguards by completing its ongoing investigations of its concededly flawed accounting policies and internal controls and instituting the reforms that must precede any rational finding that Qwest's past and present noncompliance with section 272 will not continue into the future. If Qwest had taken advantage of these opportunities and concentrated on correcting the remaining deficiencies, it could, in relatively short order, have presented a "bullet proof" application.

Instead, Qwest has largely chosen to wish away the real world deficiencies and to pretend that its withdrawal of its first two applications was somehow a victory on all issues save one. Within hours of those withdrawals, Qwest was publicly proclaiming that the Commission would quickly fall into line just as soon as Qwest could slap a "272 affiliate" label on a corporate shell with no history of accounting violations. Qwest's new application demonstrates that Qwest expects the Commission to do just that. Qwest's "supplemental" first brief in support of its new application does little more than sing the praises of Qwest Long Distance Corporation ("QLDC"), the corporate shell that Qwest quite absurdly claims will soon operate a massive nine-state long distance business, and then declare that "all remaining questions" have been answered. Rather than seriously address the outstanding OSS, pricing, interconnection, secret deals discrimination and other checklist deficiencies, Qwest relegates them to a 100 page "addendum" that, for the most part, merely offers new arguments why the Commission should, like Qwest, ignore those deficiencies.

As detailed below, Qwest's Enron-esque approach – attempting to divert attention from fundamental problems by shifting them off the books to a new affiliate – does not remotely solve its section 272 problems (and, indeed, creates new ones). But no amount of gimmickry can transform

[1] AT&T hereby expressly incorporates by reference the materials filed by AT&T, including comments, reply comments, supplemental comments, and ex parte filings, in opposition to Qwest's initial set of applications in WC Docket Nos. 02-148 and 02-189.

this into a one issue proceeding. Qwest may wish it were otherwise, but there has been no resolution of the many fundamental OSS, pricing, interconnection, or secret deals discrimination problems documented in the earlier proceedings. Because Qwest has chosen not to remedy those problems, Qwest could not, regardless of any progress it could claim on the section 272 front, establish that its local markets are irreversibly open to competition, as measured by the competitive checklist. In fact, given the startling new developments in just the past month, Qwest's new application stands on even *weaker* checklist (and public interest) footings than the previous two.

The starkest of these new developments arises in the OSS arena. Discrimination in the provision of loop qualification information – which, as the Commission has repeatedly recognized, is a clear checklist violation[2] – has long been an issue with Qwest. There has been particular concern with respect to mechanized loop testing ("MLT"), which provides much important loop information, including advanced services capabilities. As documented in the proceedings regarding Qwest's withdrawn applications, Qwest's story with regard to MLT access has, to put it kindly, "evolved" in response to CLEC claims that Qwest conducts MLTs much more routinely than it has admitted and that Qwest denies CLECs nondiscriminatory access to the information generated by that testing.

It now appears, however, that, Qwest has not only misrepresented its MLT practices to its competitors, but has *actively concealed those practices from the Commission's staff* and other regulators. The day Qwest withdrew its first two applications, AT&T received an unsolicited e-mail from Mr. Edward Stemple, who, until early September, worked as a service representative in Qwest's Omaha, Nebraska CLEC Coordination Center (which, as the name implies, coordinates "cuts" of lines from Qwest to CLECs). As Mr. Stemple details in his attached declaration, Qwest, in fact, performs an MLT for *every* loop that it cuts over to a CLEC and then enters the MLT results into

[2] *See*, *e.g.*, *Georgia-Louisiana 271 Order* ¶ 112 (to show checklist compliance, BOC must prove that it "provides competitors with access to all of the same detailed information about the loop that is available to itself and in the same time frame as any of its personnel could obtain it"); *see also UNE Remand Order* ¶ 427.

Qwest's systems. Given that Qwest has not shown that it provides CLECs with access to all of these MLT results, that revelation alone should doom this application.

The remainder of Mr. Stemple's testimony, is, however, even more damning. The Omaha facility where Mr. Stemple worked is the same Qwest facility that the Commission's staff (along with numerous Qwest representatives, including at least one of Qwest's declarants) visited in late July (while Qwest's prior two applications were pending), and Mr. Stemple's testimony and the supporting documentation that he has provided reveal truly shocking efforts to hide Qwest's MLT practices from the Commission. In short, Qwest apparently directed the service representatives that were to be observed by the Commission's staff not to pull up the MLT screen (as they normally would), not to mention MLT, and, if necessary, even affirmatively to misrepresent Qwest's MLT practices. This understandably caused many service representatives to have grave concerns, and the head of the CLEC Coordination Center responded to these concerns in an internal e-mail which Mr. Stemple has attached to his declaration. In that remarkably frank e-mail, Qwest explains that it sought to "diminish the visibility to MLT" because CLECs had asked for "access to MLT," and Qwest did not "want to bring attention to it in front of the FCC," out of fear that the Commission might have a "tendency" to grant the CLECs' requests, which would be "unfavorable" to Qwest.[3] It should go without saying both that a Commission investigation is warranted and that Qwest cannot conceivably, on this record, meet its checklist burden of demonstrating nondiscriminatory access to loop qualification information. It is equally important, however, that the Commission recognize the broader implications of Qwest's duplicity and subject all of Qwest's OSS and other claims to the most searching scrutiny.

Another recent development further underscores both that it would be particularly arbitrary and capricious to relieve Qwest of its burden to support its assertions with record evidence and that Qwest's case has weakened considerably in the past month. After a thorough investigation, an

[3] *See* AT&T (Qwest III), Stemple Dec., Exh. 1.

administrative law judge acting on behalf of the Minnesota Public Utilities Commission has released findings that show that the scope of Qwest's secret deals discrimination is even broader than previously believed. The ALJ documented numerous secret deals between Qwest and favored CLECs and concluded that Qwest had adopted a systematic practice of "intentionally structur[ing] agreements to prevent their disclosure as filed interconnection agreements."[4]

Moreover, the Minnesota ALJ found that Qwest had an *oral* interconnection agreement with McLeod "whereby Qwest would provide discounts to McLeodUSA for all purchases made by McLeodUSA from Qwest."[5] The net effect of this oral agreement was to "change[] all of the prices in McLeodUSA's interconnection agreement, including those set by the Commission in lengthy cost docket proceedings."[6] McLeod requested that Qwest put the agreement in writing, but Qwest refused to do so, because "other CLECs might feel entitled to the same discount if the agreement were written and made public."[7]

Like it did in the prior section 271 proceedings, Qwest in the Minnesota proceedings flatly denied the existence of this and other oral agreements and attacked the veracity of those who claimed otherwise.[8] The Minnesota ALJ found, however, that it was Qwest's witnesses whose testimony was not credible and was flatly "contradict[ed'" by the documentary evidence. Indeed, the ALJ found that Qwest's testimony was so at odds with the evidence that it called into question Qwest's "respect for the regulatory process."[9] This, too, demands both an investigation as well as Commission recognition that there can be no rational finding on this record that Qwest has cured its pervasive secret deals discrimination.

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[4] *Id.* at 52.

[5] *Findings of Fact, Conclusions, Recommendation and Memorandum*, In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Minnesota Public Utilities Commission, Docket No. P-421/C-02-197, at 43 (Sept. 20, 2002) ("Minnesota ALJ Decision") (Attachment 1 hereto).

[6] *Id.* at 46.

[7] *Id.* at 44.

[8] *See* Qwest II Reply at 128 n.102, 131.

[9] Minnesota ALJ Decision at 46.

Other key indicators of Qwest's section 271 compliance likewise show continuing poor performance. Qwest's rejection rate is now approximately *30 percent* of CLEC orders, Qwest's flow through rates for Unbundled Loop and UNE-P POTS ordered over EDI, as well as LNP orders have declined since May, and the rates of manual processing have increased in four of the nine states in Qwest's application. Worse yet, Qwest's "updated" entry statistics show that in the last four months the number of residential lines served via UNE-P declined sharply in Colorado, Idaho and Nebraska – on an annualized basis this competitive activity *decreased* by 88% in Colorado, 32% in Idaho, and 9% in Nebraska. Likewise, the number of total UNE-P lines are sharply decreasing in fives states – on an annualized basis by 22% in Idaho, 28% in Iowa, 24% in Nebraska, 14% in North Dakota, 30% in Utah. Qwest is right that the competition figures in its three applications are "comparable," and it is obvious why Qwest chose not to offer any such comparisons. These are hardly the hallmarks of local markets that are irreversibly open to competition.

The remainder of these comments is organized as follows: Part I shows that Qwest's application must be rejected because Qwest cannot demonstrate that it will comply with the critically important section 272 safeguards. In the weeks leading up to Qwest's withdrawal of its first two applications, it was revealed that, contrary to claims in Qwest's declarations, Qwest could not show that its longstanding section 272 affiliate, QCC, will maintain it books, records and accounts in accordance with generally accepted accounting principles ("GAAP"). That was because Qwest's underlying accounting policies and internal controls, which have long been the focus of a widening scandal and are being investigated by the Securities and Exchange Commission ("SEC"), the Department of Justice ("DOJ"), and Congress, are concededly flawed and are the subject of *ongoing* investigations by Qwest and its outside auditors. Lacking any basis for confidence in its policies and controls, Qwest was obviously in no position to claim (and the Commission in no position to find) that the accounting produced by those policies and controls would be GAAP compliant.

The only change in the few weeks since Qwest withdrew the applications is that Qwest has affixed the 272 affiliate label to a new corporate shell. The underlying accounting policies and practices that apply to *all* Qwest entities, regardless of vintage, remain under investigation and indeterminate. Qwest nonetheless claims that QLDC, unlike its predecessor, can meet the section 272(b)(2) hurdle, and that the 272(b)(2) inquiry should focus *solely* on QLDC. But the courts and the Commission have stressed that it is substance, not form, that governs in any such review,[10] and for this argument to have any validity, Qwest would have to prove that QLDC is, in fact, the entity that will "provide" in-region long distance service. The requirement to focus on substance over form is particularly clear in the section 272 context. The Commission has properly rejected the notion that "provide" as used in the Communications Act should be equated with the mere physical transmission of communications, instead finding that the term must be construed broadly to serve core "statutory purposes" – here the detection and deterrence of discrimination and cross-subsidization.[11]

The economic reality here is that QLDC is an empty vessel, without any meaningful assets and with only a handful of employees. QLDC was created out of whole cloth a mere few weeks after Qwest withdrew its prior applications, and Qwest has made clear that QLDC will be dissolved as soon as Qwest claims that QCC's books are GAAP-compliant. The few details about QLDC that Qwest has provided make plain that QLDC does not come close to having the resources to operate a functioning nine-state BOC long distance operation, even one based on switchless resale. The only possible inference is that QCC (or some other Qwest entity) will be the *real* provider of long distance service (in everything but name), and to pretend otherwise would be a ticket to swift reversal. Even Qwest candidly acknowledged in announcing the creation of QLDC that both QLDC *and QCC* "must

[10] *See*, *e.g.*, *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 623, 626 (D.C. Cir. 2000); *North Carolina Utils. Comm'n v. FERC*, 42 F.3d 659, 664 (D.C. Cir. 1994); *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 99-100 (7th Cir. 1977); *SEC v. Texas International Co.*, 498 F. Supp. 1231, 1240 (N.D. Ill. 1980); *NextWave Order* ¶ 44; *Michigan 271 Order* ¶ 36; *Fox Television Station* ¶ 48.

[11] *Qwest Teaming Order* ¶¶ 28-37.

remain compliant with section 272" in order for Qwest to obtain section 271 approval.[12] In its present application, of course, Qwest does not even claim section 272 compliance for QCC. And there is certainly no way that the Commission can find that QCC is in "*present* compliance" with section 272 given that it is now well known that QCC's "books, records, and accounts" are not GAAP-compliant.[13]

In any event, Qwest is simply wrong to suggest that because QLDC is "new," it is somehow immune to the problems that have prevented every other Qwest entity that maintains its own books – including QCII (the holding company), QC (the BOC), and QCC (the long distance affiliate) – from certifying those books as GAAP-compliant. These other entities' accounting problems are a function of the same flawed accounting policies and controls that remain in place and are applicable to QLDC as much as any other Qwest entity.

Before the SEC, where it is bound by the strict penalties of the federal securities laws, Qwest has frankly acknowledged that it is reassessing its accounting policies and controls, that this reassessment is ongoing, and that it does not even know when the review will be completed. It is also clear that Qwest's problems are pervasive and involve violations by employees at all levels of the company. In his accompanying declaration, Professor William Holder, the Ernst &Young Professor of Accounting at the University of Southern California, explains that on this record Qwest's claims that QLDC, operating under the same flawed policies and controls as QCII, QCC, and QC, can nonetheless be expected to produce GAAP-compliant books and records are contrary to the authoritative professional accounting standards.

Nor can Qwest establish, as section 272(c)(2) requires, that the BOC, QC, will comply with GAAP in accounting for its transactions with the 272 affiliate. Qwest no longer even claims that QC's books are GAAP-compliant and the prior proceedings revealed a pattern of non-compliant affiliate transactions. As Mr. Holder explains, in light of both Qwest's history of non-compliance

[12] Qwest III Schwartz Dec., Exh. MES-QC-13 (Qwest Today Announcements, Qwest Creates New '272' Affiliate).

with GAAP and the systemic nature of Qwest's problems, there is no rational basis on this record to credit Qwest's paper promises that it will nevertheless somehow get the affiliate transactions right.

In sum, Qwest has provided no evidence that it has addressed the flawed the flawed accounting policies and inadequate internal controls that plague the operations of QCII, QC, and QCC. Merely creating yet another affiliate – particularly a virtual shell corporation like QLDC – without providing concrete and persuasive evidence that Qwest has eliminated the accounting problems that pervade the operation of the other relevant Qwest entities – provides this Commission no evidentiary basis on which to make a rational finding that Qwest's new 272 affiliate will comply with its statutory obligations under section 272.

Qwest's newly minted affiliate is also inadequate to satisfy the section 272 structural and conduct safeguards. The Commission has stressed that, in making the predictive determination of future compliance with section 272 safeguards, "we will look to past and present behavior of the BOC applicant as the best indicator of whether it will carry out the requested authorization in compliance with the requirements of section 272."[14] Yet QLDC has been in operation only a few weeks, leaving only the most minimal "past and present behavior" that even potentially could be reviewed to predict future section 272 compliance. Indeed, the only "evidentiary" support that Qwest provides are the bare assertions of the very two declarants that provided the false testimony in the prior proceeding that both QC's and QCC's books complied with GAAP. And, as Mr. Lee Selwyn demonstrates in his accompanying declaration, QLDC has already in its short history engaged in violations of virtually all of the "arms' length," "separate employees" and other core section 272 safeguards.

Part II confirms that in the 19 days between Qwest's withdrawal of its prior applications and its filing of this application, Qwest has not corrected its ongoing secret deals discrimination. Indeed, as explained in the recent Minnesota decision, there is now a whole new aspect to the discrimination

[13] *Michigan 271 Order* ¶ 55 (emphasis in original).

problem – the secret *oral* interconnection agreements that Qwest does not even claim to have filed. There have been neither state nor federal attempts to divine the full scope of Qwest's secret oral deals and, given Qwest's documented efforts to obstruct the Minnesota efforts to get to the bottom of one such agreement, it would be the height of arbitrariness to rely upon bare assertions by Qwest that there are no such agreements.

Qwest also continues to violate sections 251 and 252 by not filing and making publicly available all of the written interconnection agreements it has with other CLECs, despite having committed to do so several months ago and despite the express holding of the Commission's *Interconnection Agreement Declaratory Order*. The Minnesota decision recently concluded that "Qwest has committed 25 individual violations by failing to file, as required, 25 distinct provisions (found in 12 separate agreements) for interconnection, access to UNEs and/or access to services."[15] In his accompanying declaration, Mr. Kenneth Wilson identifies the existence of other Qwest interconnection agreements that to this day have apparently not been filed with the relevant state commission.

Part III demonstrates that, in addition to the checklist violation associated with Qwest's failure to provide nondiscrimnatory access to MLT data, Qwest has failed to correct a number of other core OSS deficiencies that result in Qwest providing CLECs lower quality access to its OSS than Qwest provides to itself. For example, Qwest's unique pre-ordering and ordering processes are unreasonably complex, thereby increasing the likelihood of order rejections. Qwest's ordering and provisioning capabilities continue to be plagued by high rates of order rejections, manual processing, and manual errors. Qwest still does not even provide a readable, accurate, and auditable wholesale bill. And, as in the past, the test environments offered by Qwest still fail to mirror production.

Part IV shows that Qwest still has not met its burden of proving that its rates in *any* state in its application satisfy Checklist Item 2. Qwest is fully aware that its rates in 8 of the 9 states are based

[14] *Michigan 271 Order* ¶ 347.

on non-TELRIC costs models (and in some cases no cost models), and that the rates in those states therefore cannot stand on their own merits. In a last minute effort to address this flaw in its application, Qwest has scrambled to implement a series of (apparently still ongoing) rate reductions in those states, and now claims the Commission can ignore the serious TELRIC errors that inflate the rates in those states based on a benchmarking test, using Colorado as the benchmark state. This argument, however, has a fatal flaw – Qwest's Colorado rates are not TELRIC-compliant, and therefore cannot be used as benchmarks. The Colorado rates are inflated by numerous TELRIC violations that are documented in the prior proceedings, as well as two additional violations that are detailed below.

But even if Colorado were a valid benchmark state, the rates in many of the states covered by Qwest's application do not pass a proper benchmarking analysis. Among other things, Qwest's benchmarking approach is fundamentally flawed, because it relies on standardized usage assumptions rather than the state-specific usage assumptions that the Commission has held are more reliable and also fails to account for the fact that the Commission's Synthesis cost model cannot reasonably be used to compare costs for transport and tandem switching between very rural states (*e.g.,* Montana, North Dakota, Nebraska Washington, and Wyoming) and less rural states (*e.g.* Colorado).

Part V demonstrates that Qwest's nine-state application also must be rejected because, as AT&T previously showed, Qwest does not in many important respects provide reasonable and nondiscriminatory access to interconnection as required by the competitive checklist. Since AT&T pointed these problems out, Qwest has modified its practices in only one respect, leaving the other serious competition-inhibiting violations intact.[16] Qwest also continues to deny nondiscriminatory

[15] *Id.* at 52.

[16] In particular, Qwest (1) imposes unreasonable and non-cost-based "entrance facility" charges on CLECs that wish to interconnect at a Qwest tandem or end office switch, which anticompetitively drives up the cost of interconnection; (2) imposes substantial and discriminatory financial penalties on CLECs that fail to meet Qwest's arbitrary 50 percent trunk utilization requirement – a requirement Qwest itself does not meet and for which Qwest suffers no comparable consequences; (3) restricts efficient interconnection by barring CLECs from placing interconnection traffic on existing trunk groups that carry interLATA traffic; and (4) arbitrarily limits the length of interconnection trunks it will construct to 50 miles.

access to unbundled network elements.[17] For all of these reasons, Qwest has not demonstrated compliance with the competitive checklist, and therefore its new application must be denied.

Finally, Qwest's new application also must be denied because Qwest has not fully and irreversibly opened its local markets to competition and granting Qwest requests for interLATA authority would not be in the public interest. Instead, as AT&T has demonstrated from the beginning, Qwest has engaged in a pattern of discriminatory and anticompetitive conduct, refusing to permit testing and to provide access to CLECs, entering patently discriminatory secret interconnection deals, purchasing CLEC silence in state fact-finding proceedings, and circumventing the restrictions against its provision of interexchange service. As time has passed, Qwest's ongoing anticompetitive and unlawful actions have multiplied and spawned concerns, including new findings about its practice of entering secret deals and federal investigations into Qwest's accounting practices and disclosures. Almost inconceivably, Qwest actions illuminated *since it withdrew its applications* conclusively refute Qwest's claim that it is, and will remain, committed to accelerating and completing the process of opening its local markets to competition. For example, an administrative law judge in Minnesota now has concluded that Qwest's practice of entering secret deals was "knowing and intentional," structured specifically to prevent their disclosure, and the subject of dissembling in testimony before him. And it now appears that Qwest has actively concealed from the Commission's own staff information that is directly relevant to Qwest's claim of checklist compliance. This time of national resolve to establish corporate responsibility and effective government oversight is not the time for silently sweeping the warnings of the *Michigan 271 Order* under the carpet. Qwest has attempted to thwart competition with the hope that any long-delayed sanction will be a trivial cost of doing illicit business. The Commission must not reward this strategy by granting Qwest's premature application for interLATA authority.

[17] In particular, Qwest (1) refuses to build new facilities to serve customers; (2) refuses to provide access to the network elements of Qwest's affiliates; and (3) and refuses to combine network elements with telecommunications services. (continued)

I. QWEST HAS AGAIN FAILED TO DEMONSTRATE COMPLIANCE WITH SECTION 272 OF THE ACT.

The section 271 competitive checklist is a static inquiry; it focuses on whether a BOC has "opened" its local markets to competition at the time it files its section 271 application. But merely opening local markets to *possible* competition does not deprive the BOC of local market power and protect consumers from BOC attempts to use that local power to impede long distance competition.[18]

The Commission has therefore frequently stressed that "compliance with section 272 is 'of crucial importance' because the . . . safeguards of section 272 seek to ensure that BOCs compete on a level playing field."[19] Section 272 is "designed, in the absence of full competition in the local exchange marketplace, to prohibit anticompetitive discrimination and cost-shifting."[20] It accomplishes this through two interrelated sets of provisions. First, section 272 imposes structural and conduct safeguards that require, *inter alia*, that the BOC provide long distance services through a structural separate affiliate, that the BOC deal with that affiliate at "arm's length," and that the BOC deal with its affiliate and competitors on equal terms.[21]

Second, section 272 requires the BOC and the 272 affiliate to adhere to certain accounting and record-keeping conventions in order to give the Commission and interested parties the tools necessary to *detect* violations of the structural and conduct provisions. In particular, as implemented by the Commission in the *Accounting Safeguards Order*, section 272 requires the 272 affiliate to maintain its "books, records, and accounts" in accordance with GAAP and the BOC to do so with respect to transactions between the BOC and the 272 affiliate.[22] Absent full implementation and

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Qwest also does not provide nondiscriminatory access to transport, dark fiber, or the NID. And Qwest still refuses to make DSL services available for resale on reasonable and nondiscriminatory terms and conditions.

[18] *Non-Accounting Safeguards Order* ¶ 9("In enacting section 272, Congress recognized that the local exchange market will not be fully competitive immediately upon its opening").

[19] *Texas 271 Order* ¶ 395 (citation omitted).

[20] *Non-Accounting Safeguards Order* ¶ 9.

[21] 47 U.S.C. §§ 272(a)(2), (b)(1), (b)(3)-(5), (c). *See generally Non-Accounting Safeguards Order*.

[22] 47 U.S.C. § 272(b)(2), (c)(2); 47 C.F.R. §§ 32.1, 32.12; *Accounting Safeguards Order* ¶¶ 44, 108, 170. In the prior proceeding, Qwest acknowledged that the Commission's rules require both that the 272 affiliate keep its books in accordance with GAAP, and that the BOC account for transactions with the 272 affiliate in accordance with GAAP. *See* (continued)

enforcement of both sets of provisions, a BOC with local market power could, with impunity, act on its incentives to engage in such discrimination and cross-subsidization.[23]

To obtain long distance authority under section 271 a BOC must demonstrate that "the requested authorization will be carried out in accordance with the requirements of section 272." 47 U.S.C. § 271(d)(3)(B). Because of the "crucial importance" of section 272 compliance, the Commission has stressed that mere "paper promises" to comply with the section 272 safeguards "have no probative value."[24] The BOC must provide "actual evidence" that it has policies, systems and controls in place at the time it files its application that provide reasonable assurances of future compliance.[25]

More than any prior 271 applicant, Qwest's section 272 track record has been one of noncompliance. In its prior application, Qwest nonetheless claimed that it had fixed all of the problems, and that on a going forward basis it would comply with all section 272 requirements.[26] Commenters pointed out that these were patently inadequate paper promises.[27]

Late in the proceeding, however, it became clear that Qwest could not even credibly make paper promises and, indeed, that Qwest's initial representations to the Commission were false in critical respects. The focus of the inquiry in the waning days of the prior proceedings was on Qwest's book, records, policies and controls, which were the subject of ongoing investigations by the SEC, the DOJ and others, and which Qwest conceded would likely require restatement and reform. In the absence of sound books, records, policies and controls, there obviously could be no assurance

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Ex Parte Letter from R. Steven Davis to Marlene Dortch, WC Docket Nos. 02-148, 02-189, at 2 & n.6 (Aug. 26, 2002) ("The 'accounting principles designated or approved by the Commission' in this context are GAAP.").

[23] *Non-Accounting Safeguards Second Order on Reconsideration* ¶ 5 ("Congress . . . enacted section 272 to respond to the concerns about anticompetitive discrimination and cost-shifting that arise when the BOC enters the interLATA services market in an in-region state in which the local exchange market is not yet fully competitive.").

[24] *Michigan 271 Order* ¶ 55.

[25] *Id.* ¶ 55 ("Evidence demonstrating that a BOC *intends to come into compliance* with the requirements of section 271 by day 90 is insufficient." (emphasis in original); *id.* ¶ 347 ("past and present behavior of the BOC applicant [is] the best indicator" as to whether the BOC will comply with section 272).

[26] *See, e.g.*, Qwest II, Schwartz Dec. ¶ 44.

[27] AT&T Reply (Qwest II) at 70-73.

that Qwest would comply with its section 272 obligations on a going-forward basis. This was most obvious with respect to the section 272(b)(2) requirement that the 272 affiliate demonstrate that its "books, records, and accounts" are maintained in accordance with GAAP. Given that there was no real dispute that the books of Qwest's 272 affiliate, QCC were not GAAP-compliant – indeed, Qwest's own CFO acknowledged this fact both in letters to the Commission and in sworn statements to the SEC – Qwest ultimately conceded the obvious and withdrew its applications.

But the section 272 deficiencies triggered by Qwest's ongoing investigations ran – and run – much deeper than QCC or section 272(b)(2). In fact, the record from the prior proceedings established that Qwest's very serious accounting problems extend to the *entire* Qwest corporate family, because, it is Qwest's accounting policies themselves – and not merely the isolated failures of particular Qwest entities to follow those policies – that have been found wanting and continue to be reviewed.[28] Qwest also acknowledged in the prior proceedings that its internal controls are inadequate and need strengthening.[29] It was (and is) thus clear that Qwest also cannot satisfy the other section 272 accounting safeguard – section 272(c)(2)'s requirement that transactions between the BOC and the 272 affiliate be accounted for by the BOC in accordance with GAAP.

In its current application, Qwest claims that, by simply cobbling together in a couple of weeks a new corporation (QLDC) to serve as its 272 affiliate, Qwest has solved its section 272 problems. The reality, however, is that this window dressing does not address any of the underlying defects identified in the prior proceedings. And that is why Qwest has taken the unprecedented action of refusing to permit the relevant state regulatory commissions – which have the power to hold live hearings and conduct discovery – to review its corporate sleight-of-hand and instead demanding that the Commission review its application without the benefit of state commission scrutiny.[30]

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[28] AT&T Supplemental Comments on § 272 Compliance (Qwest I) at 7-8, 17-20, 24-26.

[29] *Ex Parte* Letter from Oren Shaffer to Marlene Dortch, WC Dockets No. 02-148, 02-189, at 2 (August 20, 2002).

[30] The state commissions, however, have begun to question the failure of Qwest to provide essential information about this new entity and its relationship to QCC. For example, the Arizona Corporation Commission Staff and Minnesota Department of Commerce have concluded that Qwest's application to provide long distance services in that state cannot (continued)

Despite Qwest's best efforts to obscure its true nature, QLDC can only be considered a sham entity. It has only a handful of employees and virtually no assets. Such an entity is patently incapable of "providing" long distance service. Of course, it was not created to be a legitimate company. Qwest has acknowledged that it intends to eliminate QLDC as soon as it can credibly claim to have fixed its accounting problems.

But even if Qwest could prove that QLDC is not a corporate fiction, the mere creation of a separate affiliate does not remedy the fundamental problems with Qwest's accounting practices. It remains the case today, as it did on September 11, when Qwest withdrew its prior applications, that the entire Qwest corporate family employs accounting polices and controls that Qwest cannot even claim, much less prove, will produce GAAP compliant records. In his accompanying declaration, Mr. William Holder, the Ernst and Young Professor of Accounting at the University of Southern California and a leading expert on financial accounting, explains that under well-established accounting standards, there can be no finding that, as required by section 272(c)(2), transactions between QC and QLDC comply with GAAP or, as required by section 272(b)(2), that QLDC will maintain its "books, records, and accounts" in accordance with GAAP until Qwest has completed its internal investigations, revised its deficient policies, and put into place and tested new, compliant controls. Indeed, Qwest's own accountants recently recognized precisely this:

> KPMG has informed us that due to the identification of the adjustments that we believe we are required to make in our financial statements, the ongoing analyses by us and KPMG of our accounting policies and practices, analyses of our internal controls and the inability of our chief executive officer and chief financial officer to [certify Qwest's financial statements], KPMG is not able to complete, as of the date of this Current Report on Form 8-K, all the procedures necessary to finalize its review of the financial statements to be included in the second quarter of 2002 report on Form 10-Q required by the regulations under the federal securities laws.[31]

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be approved until Qwest supplements the record and discloses detailed information regarding QLDC's operations. *See* Response of Staff to AT&T's Motion to Reopen and Supplement the Record, Docket No. T-0000A-997-0238 (Az. CC Oct. 7, 2002); The Minnesota Department of Commerce's Comments Regarding AT&T's Motion to Reopen and Supplement the Record, MPUC Docket No. P-421/CI-01-1372 (Min. PUC Oct. 11, 2002).

[31] August 19, 2002 Qwest 8-K at 4.

To be sure, Qwest does claim both QLDC's books and QC's books (to the extent they reflect transactions with QLDC) are somehow immune from Qwest's flawed accounting policies and inadequate controls. As Professor Holder explains, as a matter of basic accounting principles, no weight can be given to such bare management assertions unsupported by an audit or comparable investigation.[32]

Nor do Qwest and QLDC fare any better concerning Section 272's other requirements. Remarkably, despite the fact that QLDC has virtually no history to test its compliance (and it bears notice that no BOC has ever before proposed using a brand-new, untested entity as a section 272 affiliate), it is in violation of numerous provisions of section 272. For example, QLDC, with only a token number of employees, appears to have never paid anything for the numerous controls and systems it identifies as now at its disposal to meet the requirements of section 272. QLDC also has paid nothing for substantial joint marketing planning services previously provided by Qwest to QCC (valued at over $500,000) and now used by QLDC to further its market entry in violation of sections 272(b)(5), 272(c) and 272(e).

In addition, the transactions between Qwest and QLDC, all priced using a "prevailing company price" method, violate the Commission's pricing rules, and thus are contrary to the arm's length dealing obligation of section 272(b)(5). In fact, Qwest and QLDC use this same prevailing company price method for the largest and most important of their transactions – for joint marketing planning – despite that fact that Qwest does not sell similar services to a single unaffiliated third party, let alone meet the Commission's 50%-sales threshold to justify such pricing. Other misconduct, such as transacting business without written agreements and improperly posting such transactions on the Internet, underscore Qwest's and QLDC's inability to satisfy even the most basic requirements of section 272.

[32] *See* AT&T (Qwest III), Holder Dec. ¶¶ 8, 13, 14-20.

Qwest's accounting violations also prevent a finding of compliance with section 272(b)(5). ***

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Regarding Qwest's obligation to establish compliance with each of the other section 272 requirements, the application falls woefully short, especially in light of a Minnesota ALJ's earlier determination that Qwest and its previous 272 affiliate, QCC, had not met their burden on six of section 272's requirements. Qwest and QLDC simply provide no evidence to justify a finding that their employees are separate and operate independently, as required by section 272(b)(3), or that they meet their nondiscrimination obligations under section 272(c), or that they will comply with the section 272(g)'s joint marketing restrictions (including the equal access requirements).

A. Qwest Has Failed To Demonstrate That Transactions Between The 272 Affiliate And The BOC Will Be Accounted For In Accordance With GAAP Or That The 272 Affiliate Will Keep Its Books, Records, And Accounts In Accordance With GAAP.

1. QCLD Is a Sham Entity that does not Address Qwest's Fundamental Accounting Problems.

Qwest claims that the Commission for purposes of section 272 should look only at QLDC's ability to maintain "books, records, and accounts" in accordance with GAAP and can ignore the fact every other Qwest entity that maintains accounting books cannot certify those books as GAAP-compliant. But that can only be true if QLDC is the entity solely responsible for "providing" in-region long distance. If, as is the case here, QLDC is an empty vessel, Qwest's long distance services will necessarily be "provided" by other Qwest entities, and Qwest's application must be rejected out of hand.

Specifically, section 272(a)(1) requires a BOC to "provide" in-region interLATA services through a separate affiliate that complies with all the substantive requirements of sections 272(b)-(e).

In the *Qwest Teaming Order*, the Commission rejected the notion that "provide" as used in the Communications Act should be equated with the mere physical transmission of communications, instead finding that the term must be construed in light of the core "statutory purpose" of the particular provision in which it is used.[33] And, as the Commission has repeatedly recognized, the core purpose of section 272 is to prevent BOCs from using their control of "bottleneck facilit[ies]" to advantage their long distance offerings.[34] Here, Qwest's proposal would eviscerate this statutory purpose by allowing the BOC to exempt from section 272 scrutiny those entities that are, for all intents-and-purposes, "providing" the long distance service.

The courts have made clear that "form should be disregarded for substance and the emphasis should be on economic reality."[35] For example, in evaluating the reasonableness of the Commission's determinations regarding the many "ownership" and "control" provisions of the Communications Act, the courts have stressed that the Commission is obligated to "go[] beyond legal formalities . . . to determine control."[36] More broadly, the courts have "consistently refused" to accept interpretation of federal statutes that would "give effect to the corporate form where it is interposed to defeat legislative policies."[37]

This is why the Commission has also held that no weight can be given to "formalistic and formulaic" changes to corporate form in assessing compliance with substantive rules,[38] but instead

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[33] *Id.* ¶¶ 28-37.

[34] *Accounting Safeguards Order* ¶ 14; *Non-Accounting Safeguards Order* ¶¶ 10-13.

[35] *SEC v. Texas International Co.*, 498 F. Supp. 1231, 1240 (N.D. Ill. 1980) (quoting *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 99-100 (7th Cir. 1977)); *see also North Carolina Utils. Comm'n v. FERC*, 42 F.3d 659, 664 (D.C. Cir. 1994) (reversing FERC for elevating "form over substance").

[36] *See Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 623, 626 (D.C. Cir. 2000) (upholding finding that use of "sham corporation" cannot be used to evade the multiple ownership regulations promulgated by the Commission). This line of precedent is consistent with basic principles of corporate law that do not allow a company to avoid liabilities by simply creating new corporate entities. *See, e.g.*, *United States v. Mexico Feed & Seed Co., Inc.*, 980 F.2d 478, 487 (8th Cir. 1992); *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1456 (11th Cir. 1985).

[37] *First National City Bank v. Bano Para El Comercio Exteriror de Cuba*, 462 U.S. 611, 630-31 (1983) (citing precedents).

[38] *Fox Television Stations* ¶ 48.

the Commission will look to "the economic reality and substance of . . . transactions."[39] Indeed, in the *Michigan 271 Order* the Commission rejected Ameritech's attempts to circumvent section 272(b)(3)'s separate officers and directors by establishing both a BOC and a section 272 affiliate with no directors. The Commission found that Congress did not intend for the provisions of section 272 to be so "easily nullified merely through a legal fiction."[40]

The "economic reality" here is that QLDC is a mere shell corporation that has no real ability to provide long distance in Qwest's 14 state region. The new entity was created a mere three weeks before Qwest filed the instant application, and had only been licensed to do business in the nine-state region for two weeks prior to the application.[41] QLDC has only ***

***.[42] QLDC apparently has ***

***.[43] It is laughable to suggest that this all but empty shell is the entity that is going to launch, implement and manage a long distance business in nine states. The reality, of course, is that QC, the BOC, and QCC, Qwest's real long distance business unit, will be the actual "providers" of long distance service in every meaningful sense of the word.

Because that is so, Qwest has been careful to conceal which entities will, in fact, supply the critical long distance support functions that QLDC, as a mere shell corporation, obviously cannot perform itself. Indeed, despite having effectively no assets, QLDC has far fewer contracts with QC than did QCC, which was a viable, stand-alone company.[44] This raises the obvious question of how QLDC, as a shell company, is able to perform functions that even QCC had to rely upon the BOC to

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[39] *NextWave Order* ¶ 44.

[40] *Michigan 271 Order* ¶ 361.

[41] Qwest III Brunsting Dec., Exh. JLB-QLDC-2.

[42] *Id.*, Exh. JLB-QLDC-6C.

[43] *See* AT&T (Qwest III), Selwyn Dec. ¶ 39.

[44] *Compare* http://www.qwest.com/about/policy/docs/qcc/currentDocs.html *with* http://www.qwest.com/about/policy/docs/QwestLD/overview.html.

provide. The obvious answer is that another Qwest affiliate is providing those services to QLDC. But no information about such transactions has been provided by Qwest in its application.

Indeed, Qwest has not even provided the information necessary to show that QLDC has the legal authority to provide long distance in the nine-state region for which Qwest is seeking section 271 authorization. As a matter of state law, Qwest is required to obtain state certifications to operate as a telecommunications carrier. Although Qwest has provided copies of the general business certificates it has obtained to conduct business in the nine states, it has not provided copies of the necessary carrier certifications from the public regulatory commissions. AT&T understands that Qwest has applied for such certifications in a number of states, but they have not yet been granted. Thus, Qwest fails to establish that, at the time of its application, QLDC is even *authorized* to provide service in the nine states.[45]

Instead of providing the evidence necessary for the Commission to make a reasoned evaluation of its unprecedented proposal, Qwest has effectively refiled its previous section 272 declarations, substituting the new QLDC label for the old QCC label. The result approaches self-parody. For example, despite the fact that QLDC has been in existence for only a few weeks, Ms. Brunsting asserts that QLDC employees have undergone extensive training.[46] Similarly, QLDC employees, assuming there are any, will apparently have the same "red" dots on their ID badges that were place on QCC employees' badges.[47] The only thing that appears to have changed is also telling; Ms. Brunsting has now eliminated the section of her declaration previously entitled "State Proceedings Have Established That QCC Will Comply With Section 272."

[45] *See Michigan 271 Order* ¶ 54 ("In order to gain in-region, interLATA entry, a BOC must support its application with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent upon future behavior. . . . We therefore expect that, when a BOC files its application, it is already in full compliance with the requirements of section 271 and submits with its application sufficient factual evidence to demonstrate such compliance."

[46] Qwest III Brunsting Dec. ¶¶ 13, 46-49.

[47] *Id.*

The main deficiency in Qwest's application, however, is much graver than the mere failure of Qwest to carry its burden of proof. Approving Qwest's application would gut the core protections of section 272. At bottom, Qwest's position is that a BOC can create a mere shell corporation and designate that entity as the "official" 272 affiliate, but then have another stalking horse affiliate provide the shell company all the critical support and back office services that are necessary for the shell to "provide" long distance. And because, in Qwest's view, section 272 regulates only the "official" 272 affiliate, and not the entity that, in fact, does the lion's share of the work necessary to support the retail long distance offering, the Commission can approve a section 271 application even if the affiliate chiefly responsible for Qwest's long distance service does not satisfy section 272's accounting and structural safeguards.

The limited evidence that Qwest has provided suggests that QCC will continue as the entity that is chiefly responsible for Qwest's long distance offering and will provide all the support and back office services that QLDC clearly cannot. Although Qwest equivocates here, elsewhere it has expressly acknowledged that it will eliminate this shell as soon as it is able and provide long distance service through QCC.[48] In a Freudian slip, Qwest even repeatedly refers to QCC when it (presumably) means to refer to QLDC.[49] Finally, there is overlap between the officers of QLDC and QCC, including Pamela Segora-Axberg, who is Senior Vice President of Network Operations for both QCC and QLDC, despite the fact that QLDC (purportedly) has no network facilities.[50]

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[48] *Compare* Qwest III Application at 9 n.10 ("At such time QCC and QLDC may be merged, although no final decisions have been made as of now.") *with* Response of Staff to AT&T's Motion to Reopen and Supplement the Record, Docket No. T-0000A-997-0238 (Az. CC Oct. 7, 2002) ("Qwest has now established a new affiliate, Qwest LD Corp. ("QLDC"). This affiliate has been designated as the 272 long-distance affiliate for Qwest in its application. However, because QCC is the established provider of out-of-region long distance services, it is anticipated that the in-region long distance business will ultimately be provided by QCC following a merger of QLDC and QCC.") (quoting Qwest Motion to Suspend); Qwest III Schwartz Dec., Exh. MES-QC-13 (Qwest Today Announcements, Qwest Creates New '272' Affiliate) ("Once Qwest can certify that QCC is compliant with generally accepted accounting principles ("GAAP"), the two long distance affiliates will merge together.") (quoting R. Steven Davis, Qwest Senior Vice President – Policy and Law)

[49] Qwest III Application at 11 ("*QCC* has established and maintains a chart of accounts that is separate from QC.") (emphasis added); *id.* ("*QCC* maintains expenditure controls to ensure that funds are expensed and accounted for properly.") (emphasis added).

[50] *Compare* Qwest III Brunsting Dec., Exh. JLB-QLDC-7 *with* Qwest II Brunsting Dec., Exh. JLB-272-8.

The Act precludes this corporate shell game. Read together, section 271 and section 272 require that the Commission find that Qwest is in compliance with section 272 at the time it files its application, and that there is a reasonable assurance that Qwest will continue to operate in compliance with section 272 going-forward.[51] And given that it is undisputed that Qwest will attempt to provide in-region long distance through QCC in the near future, Qwest therefore must show that QCC is in "*present* compliance" with section 272, and a "paper promise" of "*future* performance" is insufficient to "satisfy [Qwest's] burden of proof."[52] Indeed, Qwest acknowledged in announcing the creation of QLDC that both QLDC *and QC* "must remain compliant with section 272" in order for Qwest to obtain section 271 approval.[53] In its present application, Qwest does not even purport to claim that QCC presently complies with section 272. Nor could it, as it is now established that QCC's "books, records, and accounts" are currently not GAAP-compliant and do not satisfy section 272(b)(2).

In short, Qwest's application must be denied regardless of whether QLDC's books can be expected to be in conformance with GAAP. QLDC is a "legal fiction" and, therefore, Qwest's application cannot turn on whether that entity satisfies section 272. Thus, Qwest's current application fails to satisfy section 272 for the reasons identified in its prior applications.

2. In Any Event, Qwest Has Not Demonstrated That QLDC And QC Will Comply With Section 271(b)(2) And Section 272(c)(2).

Even if Qwest could establish that QLDC was the only relevant entity for purposes of section 272(b)(2), it cannot establish that QLDC satisfies section 272(b)(2) and (c)(2). Although the focus in the final days of the last proceeding was on QCC's books because Qwest conceded that it could not state (much less prove) that QCC's books, records and accounts are maintained in compliance with GAAP. The inability to certify QCC's books was not the underlying problem, however, but

[51] *Michigan 271 Order* ¶ 55 ("Evidence demonstrating that a BOC *intends to come into compliance* with the requirements of section 271 by day 90 is insufficient." (emphasis in original); *id.* ¶ 347 ("past and present behavior of the BOC applicant [is] the best indicator" as to whether the BOC will comply with section 272).

[52] *Id.*

only a symptom of the problem. The same flawed policies and controls that prevented QCC from certifying its books also precluded QC (the BOC) and QCII (the holding company) from certifying that their books and records are accordance with GAAP. This is because the policies and controls used by QCC are not specific to that entity but rather as Professor Holder explains, the same accounting policies and controls appear to be used throughout the Qwest family.[54]

In its revised filing, Qwest makes no claim that it has in fact addressed and eliminated its pervasive accounting problems in general. Nonetheless, Qwest argues that QLDC's books are immune from the pervasive accounting problems that continue to prevent Qwest from certifying QCII's, QC's and QCC's books as GAAP-compliant. Qwest's primary claim is that as a "new" entity, QLDC books are "not subject to past accounting irregularities" and therefore "the Commission can be assured that its books, records, and accounts will be maintained in accordance with GAAP."[55]

This is exactly backwards. The Commission has made clear that "past and present behavior of the BOC applicant [is] the best indicator" as to whether the BOC will comply with section 272.[56] And, as Mr. Holder explains, basic accounting principles also require a proven history of compliance before a company can be considered to have reliable financial statements.[57] To say the least, Qwest's history does not inspire confidence that Qwest will properly maintain the books of any new entity. In any event, Qwest's *present* problems preclude any such finding.

Qwest's accounting problems are not simply the isolated *misapplication* of otherwise sound accounting policies. To the contrary, as Professor Holder explains, Qwest's problems are the result of *flawed* accounting policies that seemingly apply to QC, QCC, QLDC and other members of the Qwest corporate family.[58] Further, the ongoing investigations into Qwest's policies reveals that

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[53] Qwest III Schwartz Dec., Exh. MES-QC-13 (Qwest Today Announcements, Qwest Creates New '272' Affiliate).
[54] AT&T (Qwest III), Holder Dec. ¶¶ 9, 17.
[55] Qwest III Application at 11.
[56] *Michigan 271 Order* ¶ 347.
[57] AT&T (Qwest III), Holder Dec. ¶¶ 13-15.
[58] *Id.* ¶¶ 9, 17.

Qwest's problems are not simply the result of the failure of a few former employees to follow proper procedures, but a complete breakdown in accounting controls that permitted numerous employees at all levels of the company to violate basic accounting principles.[59] These are systematic and pervasive problems that cannot merely be wished away, or solved with by the creation of a new paper company or the replacement of a few senior officers.

The full scope of Qwest's accounting problems is not yet known. According to Messrs. Notebaert and Shaffer, the Qwest/KPMG investigation into Qwest's accounting practices is at a "preliminary" stage and far from "complete."[60] In fact, Qwest frankly acknowledges "new issues may be raised by the company's internal analyses, or by KPMG."[61] Qwest is also unable to state when the existing review will be concluded.[62] Given that even Qwest does not know how deep the problems go – or even when it will know how deep the problems go – there is no basis for the Commission to accept Qwest's bare assurances that QLDC's books are GAAP-compliant.

Indeed, even once the existing problems are identified, and new policies are developed and put in place, Qwest's accounting controls must still be strengthened to prevent a repeat of prior problems – as Qwest itself has acknowledged.[63] In the accounting context, a control is "[a] process – effected by an entity's board of directors, management and other personnel – designed to provide reasonable assurance regarding the achievement of objectives in the following categories: (a)

[59] *Id.* ¶¶ 17-19, 24-25.

[60] August 16, 2002 Qwest 8-K at 5,6, 9-10 ("KPMG has been analyzing the company's financial information and has provided input regarding its preliminary views on certain Qwest accounting polices, practices and procedures. Those views have been, and are continuing to be, considered as part of the company's internal analysis. KPMG has not completed its analysis.").

[61] *Id.* at 6, 11; *see also id.* at 5-6, 10-11 ("The internal analyses are not complete. I believe that the internal analyses, now being directed by new management and being informed by the views of new auditors, will result in a conclusion that the restatement of financial information and that the amendment of prior filed reports, including covered reports, will be necessary. Subsequent to the date of this statement under oath, new issues may be raised by the company's internal analyses, or by KPMG."). *See also* August 8, 2002 Qwest 8-K, Exh. at 1 ("The company is consulting with its new external auditors, KPMG LLP, on the scope of a restatement and what adjustments would be required. Until such time as these efforts have been concluded, the company cannot indicate the extent to which the results for 2000-2002 will be impacted.").

[62] August 16, 2002 Qwest 8-K at 10; *see also* August 19, 2002 Qwest 8-K at 1 ("[W]e cannot state with certainty when a restatement will be completed.").

[63] August 16, 2002 Qwest 8-K at 7, 12 ("the company needs to enhance certain internal controls").

reliability of financial reporting . . . and (c) compliance with applicable laws and regulations."[64] As Professor Holder explains, given the pervasiveness of and the number of personnel involved in Qwest's irregularities, this cannot be done overnight. Rather, putting in place (and testing) new controls will be a substantial undertaking, requiring several months of work.[65] Furthermore, even once the controls are in place, they must be rigorously tested to ensure that they function as designed.[66]

In short, it is undisputed that, with internal, civil, and criminal investigations ongoing, neither Qwest's officers nor its outside auditors are willing to opine that Qwest's accounting policies are GAAP compliant or that Qwest's internal controls are adequate to ensure compliance with the policies themselves (and other rules and laws). It is also undisputed that the irregularities disclosed to date show severe problems, but that the full scope is not known and will not be known for several months. There is, therefore, no possible basis to conclude that the weeks-old shell, QLDC, will, unlike the other members of the Qwest family, somehow maintain its books and records in accordance with GAAP, notwithstanding the absence of adequate accounting policies and controls.[67]

Nor is there any basis to conclude that transactions between QC and QLDC are immune from the pervasive accounting problems that are the symptoms of these inadequate policies and controls. As described above, Qwest is currently unable to certify QC's books as GAAP-compliant. Indeed, Qwest's affiant on this issue, Ms. Schwartz, no longer claims that QC's books are GAAP-compliant, as she had in her prior declaration.[68]

Qwest's attempt to bridge this obvious gap in its section 272 showing with paper promises must be rejected. According to Qwest, its new CFO, Mr. Shaffer, has "devoted significant time and

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[64] AT&T (Qwest III), Holder Dec. ¶ 22.
[65] *Id.* ¶ 23.
[66] *Id.* ¶ 25.
[67] *Id.* ¶¶ 9-10.
[68] *Compare* Qwest III Schwartz Dec. ¶ 30 ("The BOC is maintaining its books, records, and accounts in accordance with accounting principles prescribed by the Commission *in its transactions* with QLDC, as required by Section 272(c)(2).") (continued)

effort" to the accounting issue, has "relied upon the retention of approximately 20 experienced consultants," has "overseen the centralization of the supervision of accounting functions," and has hired new employees to perform accounting oversight.[69] Taken together, Qwest says this shows a commitment to satisfying section 272's accounting safeguards going-forward.

Even if these statements were attested to under oath – which, of course, they are not – they provide no basis for a reasoned finding that QC and QCLD will maintain the their books and account for their transactions in accordance with GAAP.[70] Again, once, as here, systemic and pervasive accounting problems have been identified – including a complete breakdown in accounting control systems – the authoritative accounting literature provides that no weight can be given to bare management assertions that future transactions will be properly recorded.[71]

And, as Mr. Holder explains, from a basic accounting perspective, there are very strong reasons for rejecting these claims.[72] First, Qwest is a repeat offender in this area. In its prior applications, Qwest's own witnesses conceded that Qwest has "had difficulty identifying QCC affiliate transactions" due to its merger with US WEST, and that these problems were so severe that they "impacted recording of accruals and billing," resulting in a misaccounting of affiliate transactions that required "over 140 interviews" with employees to unravel.[73] The validity of Qwest's affiliate transactions has also been called into question by independent parties that have investigated them. In light of the problems Qwest encountered as a result of its merger, it was recommended in a state proceeding that Qwest retain an auditor to examine certain aspects of

(emphasis added) *with* Qwest II Schwartz Dec. ¶ 48 ("The BOC follows Generally Accepted Accounting Principles ("GAAP"), including accrual accounting, to properly record expenses in the period incurred.").

[69] Qwest III Application at 12.

[70] Qwest does offer the declarations of Ms. Brunsting and Ms. Schwartz, who claim (without support or elaboration) that Qwest satisfies sections 272(b)(2) and 272(c)(2). But these are the same witnesses that previously filed false testimony that QCC maintained GAAP-compliant books – testimony that was not withdrawn even after the Qwest's accounting problems were exposed.

[71] AT&T (Qwest III), Holder Dec. ¶¶ 21-26.

[72] *Id.* ¶¶ 16-20.

[73] *See* Qwest II Schwartz Dec. ¶¶ 19, 44.

Qwest's compliance with section 272.[74] Nevertheless, despite conducting a "review" (which is far more limited than an audit), KPMG determined that Qwest's affiliate transactions violated these subsections of section 272 in twelve separate instances.[75] Thus, the most that KPMG could provide was a *qualified* opinion that Qwest materially complied with the section 272 requirements that KPMG reviewed "*except for the instances of noncompliance*."[76] Compliance "except for" at least 12 instances of noncompliance, of course, is not compliance at all.

Second, as this history shows, pervasive accounting problems cannot be solved quickly, but require considerable effort. Here, the central problem remains: Qwest's existing policies and controls have failed to produce GAAP compliance, and policies and controls that will produce GAAP compliance have not even been identified, much less implemented. Thus, until Qwest's accounting problems are fully identified and corrected, and revised controls put into place and adequately tested, there can be no reasoned finding that QC is properly accounting for its transactions with QLDC.[77]

B. There Is No Rational Basis To Conclude That Qwest's New 272 Affiliate, Created And In Operation Only Two Weeks Before This Application, Will Operate In Accordance With Section 272's Structural Safeguards.

The Commission has stressed that, in making the predictive determination of future compliance with section 272 safeguards, "we look to past and present behavior of the BOC applicant as the best indicator of whether it will carry out the requested authorization in compliance with the requirements of section 272."[78] Yet here QLDC has been in operation only a few weeks, leaving only the most minimal "past and present behavior" that even potentially could be reviewed to predict future section 272 compliance. Qwest provides no details or evidentiary backup to support its bare assertions that QLDC and QC will comply with section 272, and there is therefore no record to test

[74] *See id.* ¶ 22.

[75] *See id.*, Exh. MES-272-3; "Qwest Corporation ("Qwest") Report of Independent Public Accountants, Attestation Examination with respect to – Report of Management on Compliance with Applicable Requirements of Section 272 of the Telecommunications Act of 1996, November 9, 2001" ("KPMG Report").

[76] *Id.* at 4 (emphasis added).

[77] AT&T (Qwest III), Holder Dec. ¶¶ 10, 21-26.

[78] *Michigan 271 Order* ¶ 347.

the "paper promises" of Qwest's two section 272 declarants that QLDC and QC will do so. In contrast, in all previous successful BOC applications the section 272 affiliate had been in existence and operating and building a record *for years* before seeking approval from the Commission.[79] In fact, Qwest's general promises of compliance raise more questions than they answer. For example, one Qwest declarant states, without elaboration, that QLDC employees have been trained concerning section 272 requirements, but provides no explanation how such "training" could be accomplished in the first two weeks of QLDC's existence and no description of the nature of the training.[80] Similarly, Qwest describes the "extensive controls" that QLDC has in place to govern the sharing of services,[81] but provides no explanation as to how QLDC came to acquire, or implement, such control systems in the first two weeks of its existence. And QLDC has a total workforce of only ***   *** employees, but no information is available as to how QLDC came to have these employees (except for a general denial that they were transferred from the BOC).[82]

Instead of providing any real evidence, Qwest asks the Commission simply to accept on faith that QLDC has been able to put together a trained workforce, and has adopted and implemented effective controls and policies to comply with section 272's requirements, in a matter of weeks, while section 272 affiliates of other BOCs have spent years undertaking similar efforts.[83] Qwest's own history shows starkly why the Commission cannot reasonably rely on such a record to find that Qwest and QLDC will comply with section 272. As Qwest has previously acknowledged, the last

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[79] *See*, *e.g.*, *New York 271 Order*, ¶¶ 404-421 (Bell Atlantic's section 272 affiliates were in operation before passage of the Act, and reported transactions beginning in the summer of 1998); *Texas 271 Order*, ¶¶ 398-414 (SBC's section 272 affiliate was in operation since at least 1997, with transactions reported beginning in 1997); *Georgia/Louisiana 271 Order*, ¶ 279 (BellSouth's section 272 affiliate was created one month after the Act's passage and reported transactions beginning in 1997).

[80] *See* Qwest III Brunsting Dec. ¶¶ 46-48.

[81] Qwest III Brunsting Dec. ¶ 22(d); *see id.* ¶¶ 21(d); 22(e); 37.

[82] *See* AT&T (Qwest III) Selwyn Dec. ¶¶ 39, 44.

[83] *See supra* n.74. To be sure, it may be that Qwest's answer is that QCC simply transferred its already trained workforce to QLDC, as well as its existing controls and policies (although Qwest provides no such explanation). But if that is the case, then the sham character of the "new" QLDC becomes all the more transparent, and the application should be denied because QCC is the true party in interest and is avoiding appropriate section 272 review by putting forward QLDC as simply a front for purposes of its section 272 application. *See supra* pp. 18-22.

time Qwest was engaged in a restructuring of operations, following the US WEST merger, it suffered a serious breakdown in section 272 compliance, which by Qwest's own admission required a lengthy review of improperly handled affiliate transactions.[84]

In short, Qwest has not remotely met its section 272 burden. To the contrary, the limited evidence that is available establishes beyond question that Qwest and QLDC do not currently operate in compliance with section 272, and thus no reasoned basis exists to conclude that they will do so in the future.

1. QLDC Is Poised To Enter The InterLATA Market With Substantial Anticompetitive Subsidies.

Among the core concerns underlying section 272 is that the BOC will subsidize the operation of its section 272 affiliate by recovering the affiliate's costs from the BOC's local and exchange access service customers. Thus, section 272 requires that the BOC and section 272 affiliate keep separate books and records, operate independently with separate employees, officers, and directors, and conduct all transactions on an arms' length, non-discriminatory basis.[85]

Qwest and QLDC generically pledge compliance with each of these requirements. But nowhere in the materials submitted by QLDC, or in the materials made available pursuant to section 272(b)(5), is there any evidence that QLDC has paid anything for the myriad of capabilities and assets that it now trumpets make it ready to enter the interLATA market in compliance with section 272.

Thus, QLDC asserts generally that it has in place accounting controls and systems that allow it to comply with the section 272 accounting safeguards; it asserts that it has policies and procedures prepared and in place to ensure its ongoing compliance with section 272; and it asserts it has a

[84] *See* Qwest II Schwartz Dec. ¶¶ 19-20, 49.
[85] *See* 47 U.S.C. § 272(b), (c)(1).

workforce that has received training on the requirements of section 272.[86] Yet there is nothing to suggest that QLDC has paid anything for these services or capabilities. Plainly, if any of these services or capabilities were provided directly by the BOC, or originated with the BOC but found their way to QLDC through an affiliate (such as QCC) in a chain transaction, then it would amount to a substantial and improper subsidy of QLDC in violation of section 272, and would preclude any predictive judgment that QLDC will comply with section 272. Qwest and QLDC ignore this issue, despite the fact that it is self-evident that QLDC, in operation only two weeks and with only a token workforce, was and is in no position to have developed these capabilities and systems internally.

A stark example of such cross subsidization of QLDC by Qwest involves joint marketing services. According to an Administrative Law Judge for the Minnesota Commission, Qwest previously had provided the old section 272 affiliate, QCC, with over $500,000 worth of joint-marketing planning services (for which QCC was billed).[87] Because QLDC has now replaced QCC as the section 272 affiliate, there is every reason to believe that these valuable joint-marketing planning services will be put to use in furthering QLDC's market entry. Given that there can be no dispute that such marketing services originated with QC, they are subject to all section 272 requirements (except the nondiscrimination obligation under section 272(c)) even if they passed through an affiliate before receipt by QLDC.[88] Yet there is no record that QLDC has paid *anything* for these previously completed marketing services.[89] More broadly, Qwest has made no effort to establish, as it must, that QLDC has not received such improper cross subsidization in violation of section 272.

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[86] *E.g.* Qwest III Brunsting Dec. ¶¶ 21 (QLDC accounting processes and expenditure controls); 22(d) (QLDC controls concerning shared services and confidential information); 37 (QLDC billing processes); 47-48 (QLDC employee training).

[87] In the Matter of a Commission Investigation Into Qwest's Compliance with the Separate Affiliate Requirements of the Telecommunications Act of 1996 (Section 272), Minnesota Pub. Util. Comm., Findings of Fact and Conclusions of Law and Recommendations, PUC Doc. No. P-421/C1-01-1372 (Mar. 14, 2002) (hereinafter "Minnesota ALJ Findings"), ¶ 116.

[88] *See Accounting Safeguards Order*, ¶¶ 183, 251 (discussing chain transactions); *Non-Accounting Safeguards Order*, ¶ 309 (same); *Michigan 271 Order*, ¶ 373 (same).

2. Qwest And QLDC Have Not Established Compliance With The Separate-Employee Requirement Of Section 272(b)(3).

Under section 272(b)(3), a BOC and its section 272 affiliate must have "separate officers, directors, and employees." This requirement is intended to ensure, among other things, that the BOC and section 272 affiliate are truly separate operating entities with "independent management and control of the two entities."[90]

Yet QLDC is merely a shell, with an insignificant number of its own employees, and entirely dependent upon the services of employees of QC and other Qwest affiliates. As discovered by Dr. Selwyn, during the first weeks of QLDC's existence, at least *** *** BOC employees have worked on QLDC work.[91] QLDC's application gives no reason to conclude that this arrangement will not continue indefinitely. Although the Commission previously has found that BOC employees may provide certain services to the section 272 affiliate without running afoul of the separate-employees requirement,[92] it has never suggested that the work of BOC employees, in conjunction with the work of employees of other BOC service affiliates, can so dominate the operation of the section 272 affiliate that they effectively run it. Under these circumstances, Qwest and QLDC cannot satisfy the "separate-employee" requirement of section 272(b)(3).

Qwest and QLDC cannot meet their burden under section 272(b)(3) simply by submitting lists of its current officers and directors and declaring that the payrolls for Qwest and QLDC contain no overlapping names.[93] For example, a BOC-paid employee could not properly be deemed "separate" if he reports to a QLDC supervisor and works day-to-day alongside QLDC employees.

Tellingly, Qwest recites no policy and presents no evidence concerning the structure of employee reporting and supervision. Qwest cannot maintain an integrated workforce of BOC and section 272 affiliate employees, with Qwest employees reporting to BOC supervisors and BOC

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[89] *See* http://www.qwest.com/about/policy/docs/QwestLD/overview.html.

[90] Michigan 271 Order, ¶ 360.

[91] *See* AT&T (Qwest III) Selwyn Dec. ¶¶ 45.

[92] *See Non-Accounting Safeguards Order* ¶ 179.

employees reporting to Qwest supervisors, and still claim "separation" under section 272(b)(3) through the simple expedient of maintaining separate payrolls, publishing generic service-agreements, and using employer-identifying nametags.

Similarly, although QLDC asserts that none of its current employees were transferred from the BOC, it makes no representation as to how many of its employees had originated with the BOC but passed through QCC before landing at QLDC.[94] Given the Minnesota ALJ's conclusion (with regard to Qwest and QCC) that "[t]here is legitimate concern over employee transfers as a means of evading the separate employee requirement,"[95] no finding can be made under section 272(b)(3) while Qwest and QLDC are silent on the issue of employee transfers through such chain transactions.[96]

3. Qwest And QLDC Currently Violate The Section 272(b)(5) Requirements That All Transactions Be At Arm's Length, Reduced To Writing, And Publicly Available.

Section 272(b)(5) requires that "all transactions" between Qwest and its section 272 affiliate be "on an arm's length basis with any such transactions reduced to writing and available for public inspection." To satisfy the "arm's length" requirement of section 272(b)(5), transactions between a BOC and section 272 affiliate must satisfy the applicable affiliate-transaction pricing rules to ensure that the section 272 affiliate is not effectively being subsidized by the BOCs' regulated customers.[97]

The Commission has approved a hierarchy of three methods for pricing affiliate transactions under the arm's length requirements of section 272(b)(5). In general, if a tariff exists for the product or service, then the BOC must charge the affiliate the tariffed rate. If no tariff exists, but the BOC sells more than 50% of its total output of the product or service to unaffiliated third parties, then that rate – referred to as the "prevailing company price – must also be used for affiliate transactions.[98] If neither tariffed rates nor prevailing company prices exist, then the BOC must charge the affiliate *the*

[93] *See* Qwest III Schwartz Supp. Dec. ¶¶ 32-33.
[94] *See* Qwest III Schwartz Supp. Dec.¶ 35; AT&T (Qwest III), Selwyn Dec. ¶ 44.
[95] Minnesota ALJ Findings ¶ 54.
[96] AT&T (Qwest III) Selwyn Dec. ¶ 39.
[97] *Accounting Safeguards Order* ¶¶ 126, 135-166.

higher of the "fully distributed cost" and the "fair market value," each determined through recognized methodologies.[99] Qwest and QLDC's reported transactions blatantly violate these pricing rules.

First, as Dr. Selwyn explains, Qwest identifies prevailing company price as the valuation method for *all* its QLDC transactions.[100] ***

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Qwest and QLDC's uniform practice of pricing their transactions at "prevailing company prices" (without any identified third party transactions) would violate section 272(b)(5) and the Commission's rules *** ***. As the Commission has stressed, the mere offering of an asset or service to unaffiliated entities is not sufficient to establish a prevailing price," because then "there can be no assurance that the price agreed upon by the carrier and its affiliate represents the true market price, thus raising legitimate concerns as to whether the parties actually negotiated on an arms length basis."[101] For this reason, the Commission has determined that the prevailing company price valuation method can be used, typically, only if the BOC meets a 50% threshold for sales of the product to unaffiliated third

[98] *Accounting Safeguards Order* ¶¶ 126, 136.
[99] *Id.*; AT&T (Qwest III) Selwyn Dec. ¶ 13.
[100] *See* AT&T (Qwest III) Selwyn Dec. ¶ 12.
[101] *Accounting Safeguards Order* ¶ 134.

parties.[102] The exception to this 50%-threshold rule for sales to section 272 affiliates applies only where, under section 272(c), the BOC must make the product or service "generally available" to unaffiliated third parties at the same rates.[103] Because joint-marketing services are exempt from the section 272(c) nondiscrimination rule, however, this exception to the 50%-threshold rule has no application for such services.

Qwest and QLDC nonetheless price their marketing services agreement at prevailing company prices, without any suggestion that Qwest provides the same services to even one unaffiliated party.[104] Nor is this blatant violation of the Commission's pricing rules insubstantial. The marketing services agreement is far and away the largest reported transaction between Qwest and QLDC, with charges to QLDC well exceeding *** *** for only three weeks of service.[105]

More generally, Qwest's use prevailing company prices for all its transactions with QLDC cannot be squared with the arm's-length requirement. No other BOC previously has made such extensive use of the prevailing company price valuation method for transactions with their section 272 affiliates.[106] Instead, BOCs and their section 272 affiliates have followed traditional pricing valuation methods for their transactions, typically using the higher of the estimated market value and fully distributed cost where the product or service is not tariffed and does not meet the 50% sales threshold for the prevailing company price method.[107] As Dr. Selwyn establishes, where a BOC like Qwest has not sold the subject service to any unaffiliated third party and could never expect to make such a sale (given the nature of the service), then the use of the prevailing company price valuation method violates the arm's length requirement of section 272(b)(5). Under such circumstances, the

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102 *Id.* ¶ 136.
103 *Id.* ¶ 137.
104 AT&T (Qwest III) Selwyn Dec. ¶¶ 21-22, 25.
105 AT&T (Qwest III) Selwyn Dec. ¶ 25.
106 AT&T (Qwest III) Selwyn Dec. ¶ 22.
107 AT&T (Qwest III) Selwyn Dec. ¶ 22.

exception to the 50%-sales threshold for section 272 affiliates is inapplicable, because the service cannot be said to be "available" to an unaffiliated third party.[108]

Nor can these Qwest-QLDC transactions be found to be at arm's length, when, as the Minnesota ALJ found concerning Qwest and QCC, both entities depend on their joint parent, QSC, to provide legal, public policy, and financial services for such transactions.[109] As the ALJ reasoned: "Entities dealing with each other cannot depend upon the same source for legal services, public policy analysis, and financial consulting with respect to transactions occurring between the two entities and remain at "arm's length" in a transaction."[110] Qwest presents no evidence in its application to dispel the previous showing that both Qwest and its section 272 affiliate would depend on their joint parent for these same core services. In fact, it appears that QLDC will be even more dependent on such services, because it operates essentially as a shell, with only a token number of employees to perform its work.[111]

Qwest and QLDC also have breached section 272(b)(5) by backdating a number of their service contracts.[112] Section 272(b)(5) mandates that BOCs engage in transactions with their section 272 affiliates only through written agreements. Yet the backdating of Qwest-QLDC agreements shows that Qwest and QLDC engaged in transactions, at least for a period of time, without written agreements and in violation of section 272(b)(5). This conduct also plainly violated section 272(c)'s nondiscrimination rule, as Qwest would never perform a transaction for an unaffiliated third party without an executed agreement.[113]

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[108] *See* AT&T (Qwest III) Selwyn Dec. ¶¶ 14-16, 20; *Accounting Safeguards Order* ¶ 137.

[109] Minnesota ALJ Findings ¶¶ 78-80.

[110] *Id.* ¶ 79.

[111] Moreover, as the Minnesota ALJ points out, the failure to engage in arm's-length transactions can seriously damage competition, because, for example, transaction pricing for a BOC and section 272 affiliate ultimately has a net zero effect on the financial returns to their joint owner, but has a serious impact on competing carriers because of the section 272(c) obligation to offer the same terms to competitors. *See* Minnesota ALJ Findings, ¶¶ 83-84.

[112] AT&T (Qwest III) Selwyn Dec. ¶¶ 35-37.

[113] AT&T (Qwest III) Selwyn Dec. ¶ 36.

Finally, as detailed by Dr. Selwyn, Qwest also has failed to accurately post each of its QLDC transactions on the Internet – continuing the practice that it followed with QCC.[114] In the *Accounting Safeguards Order*, the Commission required that the "detailed description" of the affiliate transactions that reveal all the "terms and conditions of the transaction" be posted on the Internet.[115] The Commission then went on to require that "[t]his information must *also* be made available for public inspection at the principal place of business of the BOC."[116] Thus, the Commission made clear that the information to be provided on the website is the *same* information that is to be made available at the BOC's principal place of business – *i.e.*, information that provides *all* of the "terms and conditions of the transaction." As the Commission recognized, any other rule would impose substantial and unnecessary costs on interested parties.[117] The requirements of this rule can hardly be disputed as the other regional Bell operating companies have posted the underlying contracts between the separate affiliate and the BOC.[118]

These posting deficiencies further confirm that the procedures used by Qwest and QLDC to ensure accurate and timely posting of transactions are not working. There thus is no reason to conclude that Qwest and QLDC will comply with section 272(b)(5)'s disclosure requirements if granted interLATA authority. Their failure to establish that they will comply with this aspect of section 272(b)(5) is inescapable, especially in light of Qwest's past documented failures to reduce covered transactions to writing and make them publicly available.[119]

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[114] AT&T (Qwest III) Selwyn Dec. ¶¶ 31-38.

[115] *Accounting Safeguards Order* ¶ 122.

[116] *Id.* (emphasis added).

[117] *Id.* ("The broad access of the Internet will increase the availability and accessibility of this information to interested parties, while imposing a minimal burden on the BOCs.").

[118] *See, e.g.*, http://bellsouthcorp.com/policy/transactions (embedding links to actual contracts within transaction summaries); http://www.sbc.com/public_affairs/regulatory_documents/ affiliate_agreements/0,5931,199,00.html (same).

[119] *See* Minnesota ALJ Findings, ¶¶ 94-101.

Qwest and QLDC repeatedly have violated section 272(b)(5) in just the first few weeks of QLDC's existence. Given their current noncompliance, no reasonable basis exists to find that they will comply with section 272(b)(5) should interLATA authority be granted.

4. Qwest And QLDC Have Not Demonstrated Compliance With Section 272(c)'s Nondiscrimination Requirement.

Section 272(c)(1) "requires that a BOC in its dealings with its section 272 affiliate 'may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards.'"[120] Qwest and QLDC have not demonstrated compliance with this nondiscrimination requirement.

Significantly, the Minnesota ALJ previously found that Qwest and QCC had not established that their exchange of confidential information complied with this nondiscrimination requirement.[121] Qwest presents no evidence to undermine this conclusion concerning it and QLDC. Instead, Qwest continues only to claim generally that the use of confidential information by employees transferred between Qwest and QLDC is prohibited, and suggests that access to such confidential information is just as restrictive for employees of Qwest or QLDC as it is for employees of a competing carrier.[122] But, as in its previous application, Qwest ignores the fact that substantial confidential information is shared with, and inevitably used by, Qwest affiliates that provide substantial joint services for both Qwest and QLDC. Qwest describes no restriction on the availability of such Qwest or QLDC confidential information indirectly through affiliate personnel who provide services to both Qwest and QLDC.[123] Indeed, Qwest continues to refuse even to acknowledge a legal obligation to preclude such indirect use of confidential information. Especially in light of QLDC's almost total dependence

[120] *Second Louisiana 271 Order* ¶ 341 (quoting § 272(c)(1)).
[121] Minnesota ALJ Findings, ¶¶ 105-06.
[122] *See* Qwest III Schwartz Supp. Dec. ¶ 35; Qwest III Brunsting Dec. ¶ 22(d).
[123] *See* Minnesota ALJ Findings, ¶ 106.

on such shared services, Qwest and QLDC cannot meet their burden of proof regarding section 272(c) on this record.[124]

5. Qwest Continues Not To Present Any Evidence To Establish Compliance With The Joint Marketing Restrictions Of Section 272(g).

As in its previous application for section 271 authority, Qwest continues to present no evidence to establish compliance with its marketing obligations under section 272(g). Instead, Qwest and QLDC simply parrot the requirements of the statute, and pledge compliance.[125] Whatever the merit of such an approach where the section 272 affiliate has some history, and has been reviewed by state commissions, it has none when the BOC proposes to use a section 272 affiliate that has only been in existence for a few weeks. This a total absence of joint-marketing evidence also cannot meet Qwest's burden of proof in light of the fact that the Minnesota ALJ specifically found that Qwest and its previous section 272 affiliate, QCC, had not established compliance with section 272(g).[126]

Qwest makes clear its intention jointly to market QLDC's services if its application is approved,[127] and the available evidence indicates these marketing efforts on behalf of QLDC have been substantial. For example, Qwest's required disclosures under section 272(b)(5) reveal that it already has billed QLDC over ******* ******* for joint-marketing "planning" services.[128] And the Minnesota ALJ noted that Qwest had billed the previous section 272 affiliate QCC over $500,000 for similar joint-marketing "planning" services.[129] Yet Qwest and QLDC nonetheless present no evidence to show that the planned joint marketing has been and will be conducted in compliance with section 272(g) and the *Non-Accounting Safeguards Order*. For example, Qwest and QLDC make no effort to show that the substantial planning and preparation for joint marketing already completed is

[124] Because of the lack of information provided by Qwest concerning its joint marketing work on behalf QLDC concerning "planning" services, no finding can be made that the joint marketing efforts (not available to competing IXCs) are exempted from compliance with section 272(c). *See infra* at 38-39; Minnesota ALJ Findings, ¶¶ 108, 117.

[125] *E.g.* Qwest III Brunsting Dec. ¶¶ 39-45.

[126] *See* Minnesota ALJ Findings, ¶¶ 109-131.

[127] *E.g.*, Qwest III Schwartz Supp. Dec. ¶ 69.

[128] AT&T (Qwest III) Selwyn Dec. ¶ 25.

[129] *See* Minnesota ALJ Findings ¶ 116.

consistent with the requirement that such "joint marketing" not include "BOC participation in the planning, design, and development of a section 272 affiliate's offerings."[130]

Although the Commission has found that a BOC need not submit proposed marketing scripts in order to show compliance with section 272(g),[131] it has never suggested that an applicant need present *no* evidence other than paper promises to show compliance with section 272(g)'s joint marketing requirements. For example, Qwest mentions that training "makes it clear that ... product design, planning and development of QLDC services are not part of joint marketing,"[132] but submits no training materials to support this assertion. Again, Qwest's simple pledge that it will not participate in such conduct is insufficient, especially in light of the broadly worded joint marketing agreement between it and QLDC[133] and the fact that Qwest just last year indisputably engaged in illegal marketing of QCC's services, only later to explain it "occurred under a mistaken interpretation of the application of the Act."[134]

II. QWEST'S PERVASIVE AND ONGOING SECRET DEALS DISCRIMINATION REQUIRES THAT THE COMMISSION REJECT THESE APPLICATIONS.

It became clear in the proceedings on Qwest's prior applications that Qwest deliberately had engaged for years in a pervasive and secret course of discrimination among CLECs in violation of the core nondiscrimination requirements of the competitive checklist.[135] Qwest engaged in this discrimination not merely to gain commercial advantage, but to buy the silence of CLECs that might otherwise contradict the testimony that Qwest relies on in this proceeding and in the state proceedings

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130 *Non-Accounting Safeguards Order*, ¶ 296; *see* Qwest III Schwartz Supp. Dec. ¶ 70.

131 *South Carolina 271 Order* ¶ 236.

132 Qwest III Brunsting Dec. ¶ 43.

133 With regard to a similar marketing agreement between Qwest and QCC, the Minnesota ALJ noted that Qwest had committed to help with, among other things, "planning sales and promotion functions," but no Qwest witness was able to describe what was involved in the "planning functions." Minnesota ALJ Findings ¶¶ 113-115.

134 Minnesota ALJ Findings, ¶ 125. Specifically, in July 2001, Qwest ran advertisements in Minnesota newspapers promoting QCC's performance in a consumer satisfaction survey, and the Minnesota ALJ found that "the advertisements and scripts used by Qwest demonstrate that Qwest was engaged in joint marketing activity of the Qwest BOC and its section 272 Affiliate prior to Qwest's entry into the interLATA market." Minnesota ALJ Findings ¶ 123.

as discussed below. Qwest's unlawful conduct precludes approval of its application because it casts the entire review mechanism into doubt and renders the record on critical checklist issues unreliable, by fatally compromising the results of independent third-party testing of Qwest's wholesale provisioning system and distorting the record regarding Qwest's performance.

New developments that have occurred since Qwest withdrew its prior applications further confirm the nature and extent of Qwest's unlawful secret deals discrimination. These developments remove any doubt that the Commission is foreclosed from making the nondiscrimination findings that are necessary for approval of Qwest's new application. Most notably, the findings of an Administrative Law Judge in a Minnesota complaint proceeding regarding Qwest's secret deals provide the strongest evidence yet of Qwest's ongoing discrimination and confirm beyond doubt what Qwest continues to deny – Qwest's entry into discriminatory *oral* agreements to provide certain CLECs with more favorable rates. In addition, this Commission has now flatly rejected Qwest's narrow interpretation of the scope of the filing requirement under 252(a), adopting instead a broader definition of the term "interconnection agreement" that plainly encompasses agreements that Qwest still has failed to file in Minnesota, Arizona and the nine states that are the subject of the Qwest III application.[136] Indeed, AT&T's analysis of the agreements Qwest has placed on its website with the agreements at issue in the various state proceedings reveals that Qwest in fact *still has not* filed or posted all of its *written* interconnection agreements, much less the equally important oral agreements.

A. Qwest's Discriminatory Oral Secret Deals Preclude Any Finding Of Checklist Compliance.

The record in the proceedings on Qwest's prior applications, including Qwest's own belated filing of a number of previously unfiled interconnection agreements, conclusively demonstrated that

[135] *See* 47 U.S.C. §§ 271(c)(2)(B)(i-ii) (requiring "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)," which in turn require both "nondiscriminatory" access to UNEs and "nondiscriminatory" UNE rates).

[136] Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, FCC 02-276, WC Docket No. 02-98 (Oct. 4, 2002) ("*Interconnection Agreement Declaratory Order*").

Qwest had, contrary to its representations, engaged in a pervasive practice of executing secret written interconnection agreements with favored CLECs, giving them preferential UNE rates and better terms for provisioning and resolving disputes over service, to the competitive detriment of all others. As demonstrated below, Qwest's assertions that it has fully cured this discrimination by filing all previously unfiled written interconnection agreements are false, and the application must be denied upon that basis alone.

But even if Qwest could demonstrate that it has now filed all previously unfiled *written* interconnection agreements, Qwest plainly has not filed its *oral* secret deals, and that discrimination is equally fatal to its claim of checklist compliance. Citing findings by the Minnesota Department of Commerce and the staff of the Arizona Corporation Commission ("ACC"), AT&T raised Qwest's oral secret deals conduct in the proceedings on Qwest's prior section 271 applications.[137] Qwest flatly denied the existence of these oral agreements, stressed that no findings had been made in the Minnesota proceeding, and attacked the credibility and veracity of the CLEC witnesses that admitted oral agreements with Qwest.[138]

It is now clear that there was no basis for Qwest's assertions – the recent decision by a Minnesota ALJ confirms that the oral agreement identified by both the ACC staff and the Minnesota DOC does indeed exist, and that Qwest's arguments to the contrary were so incredible that they call

[137] *See* AT&T (Qwest II) Reply at 11-12, 14; Supplemental Testimony of W. Clay Deanhardt, July 24, 2002, at 2, 9 (Qwest and McLeod entered into oral agreements whereby "Qwest would provide discounts to McLeod for all purchases made by McLeod from Qwest"; these discounts "ranged from 6.5% to 10% depending on the volume of purchases made" by McLeod); *id.* at 8-9 (Qwest did not want to put the discounts in writing because it was "concerned that other CLECs might feel entitled to the same discount if the agreement were written and made public"); *Supplemental Staff Report And Recommendation In The Matter Of Qwest Corporation's Compliance With Section 252(e) Of The Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, at 5 (Aug. 14, 2002) ("Arizona Supplemental Report") (Attachment 1 to AT&T's Qwest II Reply Comments) ("two carriers had oral agreements with Qwest, Eschelon and McLeod"). The Arizona Staff noted that the data responses to its inquiries "also indicated that Qwest had both written and/or oral agreements with XO, Z-Tel (for 60 days only), Eschelon and McLeod wherein these CLECs agreed not to oppose Qwest's 271 application or participate in 271 proceedings." *Id.* at 7.

[138] *See* Qwest II Reply at 128 n.102 ("Qwest does not concede that it entered into such a binding [oral] legal agreement, and has presented evidence to that effect before the Minnesota Commission"); *id.* at 131 ("Qwest provided evidence in Minnesota that no such oral agreement exists, that such an oral agreement would have been barred by the written agreements of the parties, that the parties did not account for the transaction as a discount, and other information refuting the MDOC's claims").

into question Qwest's "respect for the regulatory process."[139] Like the IUB and ACC Staff, the Minnesota ALJ concluded that Qwest entered into numerous discriminatory agreements with favored CLECs that granted them preferential rates, terms and conditions, and failed to file those agreements with state commissions in violation of its obligations under sections 251 and 252.[140] The ALJ further found that Qwest's violations of sections 251 and 252 were "knowing and intentional."[141] And in so finding, the ALJ specifically rejected Qwest's contrary testimony as "not credible" and contradicted by the documentary evidence.[142]

The Minnesota ALJ specifically found that Qwest had in fact entered into an *oral* agreement with McLeod "whereby Qwest would provide discounts to McLeodUSA for all purchases made by McLeodUSA from Qwest."[143] The net effect of this agreement was to "change[] all of the prices in McLeodUSA's interconnection agreement, including those set by the Commission in lengthy cost docket proceedings."[144] McLeod requested that Qwest put the agreement in writing, but Qwest refused to do so because "other CLECs might feel entitled to the same discount if the agreement were written and made public."[145] This was consistent with Qwest's generally practice of "intentionally structur[ing] agreements to prevent their disclosure as filed interconnection agreements."[146]

These findings establish conclusively that Qwest entered into an oral agreement with McLeod in which Qwest gave preferential rates for UNEs that were not available to other carriers. Further, it is clear that this oral agreement is an "interconnection agreement" within the definition of the term adopted by the Commission in its recent *Interconnection Agreement Declaratory Order*. The oral

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[139] *Findings of Fact, Conclusions, Recommendation and Memorandum*, In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Minnesota Public Utilities Commission, Docket No. P-421/C-02-197, at 46 (Sept. 20, 2002) ("Minnesota ALJ Decision") (Attachment 1 hereto).
[140] *Id.* at 53.
[141] *Id.*
[142] *Id.* at 46.
[143] *Id.* at 43.
[144] *Id.* at 46.
[145] *Id.* at 44.
[146] *Id.* at 52.

agreement created an "*ongoing* obligation pertaining to . . . unbundled network elements."[147] Indeed, Qwest's secret oral deal with McCleod meets even Qwest's cramped view that only provisions of agreements pertaining to rates for UNEs needed to be filed with state commissions and made available to CLECs.[148]

Because it can no longer plausibly deny the existence of its secret oral deal with McLeod, Qwest has likely reacted in the same manner it has reacted to the revelation of other discriminatory secret deals it never intended to make public – by paying off McLeod to give up the preferential terms that Qwest does not wish to extend to other CLECs. But that ploy simply creates a new secret deal that Qwest is obligated to make available to other CLECs. In its *Interconnection Agreement Declaratory Order*, the Commission rejected Qwest's blanket argument that "settlement agreements" are not interconnection agreements:

> a settlement agreement that contains an ongoing obligation relating to section 251(b) or (c) must be filed under section 252(a)(1). Merely inserting the term 'settlement agreement' in a document does not excuse carriers of their filing obligation under section 252(a) or prevent a state commission from approving or rejecting the agreement as an interconnection agreement under section 252(e). However, we also agree with Qwest that those settlement agreements that simply provide for 'backward-looking consideration' (*e.g.*, the settlement of a dispute in consideration for a cash payment or the cancellation of an unpaid bill) need not be filed. That is, settlement contracts that do not affect an incumbent LEC's ongoing obligations relating to section 251 need not be filed.[149]

Here, given the undisputed fact that the oral agreement entered into by Qwest and McLeod created ongoing obligations on Qwest's part, any payment made by Qwest to end that agreement would simply reflect the net present value of that forward-looking obligation. Although the form might be different, such a "settlement" would accordingly give McLeod the same effective rate discounts that it had under the original secret deal and thus plainly affects "ongoing obligations relating to section 251" under any meaningful sense of that word. Certainly, given the lengths to which Qwest has gone

[147] *Interconnection Agreement Declaratory Order* ¶ 6 (emphasis in original).
[148] *Id.* ¶ 2.

to hide the McLeod secret deal, there could be no rational endorsement of any Qwest claim that the oral McLeod secret deal has been "terminated" absent review of all of the underlying documents, including any side deals and payments.

Although the existence of the McLeod oral agreement is alone sufficient grounds to reject Qwest's application, the Minnesota decision also raises questions as to how many other secret oral agreements between Qwest and CLECs exist. Although Qwest has adamantly denied the existence of any oral agreements (including the McCleod agreement) – just like it denied both the existence of written secret deals and any obligation under the Act to make these deals available on a non-discriminatory basis – it is now absolutely clear that these claims cannot be credited. Until Qwest can demonstrate that it has no outstanding oral secret deals, like the ones discovered in the Minnesota and Arizona proceedings, there can be no reasoned finding by the Commission that Qwest has, in fact, complied with the nondiscrimination obligations of the checklist. And, in light of Qwest's conduct, no weight can be given to any claim by Qwest that it will file all of its oral secret agreements. Under longstanding Commission precedent, Qwest bears the burden of *proving* that it complies with the checklist and in order to satisfy this burden, Qwest cannot merely assert that the problem has been corrected.[150] This is particularly true where, as here, Qwest has repeatedly stonewalled and misrepresented the existence of the secret deals to both this and state commissions.

On this record, there can be no finding that all of the relevant oral agreements have been filed until there has been a thorough investigation by the state commissions, which have the power to conduct discovery and hold live hearings. Although several of the states in the nine-state region have investigated Qwest's secret written deals, these proceedings were not designed to uncover *oral* agreements. Accordingly, while it is now clear that Qwest has entered into oral agreements, what is

[149] *Id.* ¶ 8.

[150] The Commission is not permitted to make findings of checklist compliance based on "trust." *Massachusetts 271 Order*, 16 FCC Rcd. 8988, ¶ 11 (2001) ("The BOC at all times bears the burden of proof of compliance with section 271, even if no party challenges its compliance with a particular requirement"); *see also Qwest I Notice*, DA 02-1391 (June 13, 2002) (Qwest has "burden of proof").

unclear is how many *more* secret oral agreements are out there beyond those uncovered in Minnesota and Arizona.

B. Qwest's Recent Filing And Posting Of Agreements Did Not, And Could Not, Cure The Discrimination And Other Secret Deals-Related Deficiencies In Its Application.

There can also be no finding that Qwest has in fact filed all of its written secret interconnection agreements. Qwest asserts that by virtue of its recent filings with state commissions and postings on its website of "its previously unfiled contracts with CLECs that contain currently-effective provision related to Section 251(b) or (c) matters," "Qwest today is in compliance with Section 252 under any reading of the Act, and hence this matter presents no Section 271 issue."[151] However, given the recent findings in the Minnesota proceeding regarding Qwest's intentional and knowing practice of entering secret deals and oral agreements, and Qwest's track record of narrowing the scope of the term "interconnection agreement" beyond reasonable bounds (and certainly the bounds established in the states and by the Commission's declaratory ruling), Qwest's bare assertion that it has abruptly reversed course and now made public all of the relevant agreements cannot be credited. To the contrary, AT&T has reviewed the agreements that Qwest has recently filed with state commissions and posted on its website to date, and has identified a number of interconnection agreements that have not been filed or posted.[152]

The Minnesota ALJ decision identified numerous instances where Qwest entered into deals with CLECs regarding core interconnection provisions yet failed to file those documents and make

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[151] Qwest III Application at 7, 8; *see also id.* at 9 ("Qwest has taken all the steps it possibly can to meet a broad interpretation of the filing obligations applicable to ILECs pending further clarification of this legal question"); *id.* at 7 ("[T]here can be no debate that Qwest is making available to all CLECs in a state any Section 251-related contract right that it is making available to one").

[152] Qwest also has adopted a practice of filing only agreements that it deems to be currently operative. Qwest thus seeks to preclude scrutiny of terminated agreements that were operative throughout the state proceedings, the terms on which these deals were terminated, and the impact on competition of the termination of significant interconnection agreements. Qwest also is limiting the provisions that a CLEC can pick and choose in the agreements on the web site. And Qwest has eliminated some of the most important provisions in this regard. The purpose of the pick-and-choose provisions of the Act is to allow CLECs to pick-and-choose terms from BOC interconnection agreements, not to allow BOCs to pick-and-choose which terms it will make available to CLECs. Furthermore, Qwest's recent filings do not remedy the flaws in the (continued)

them available to other carriers. Several of these discriminatory agreements addressed critical billing and pricing matters such as reciprocal compensation,[153] a 10 percent discount on all prices in a CLEC's interconnection agreement,[154] and a per line credit that "reduced the cost to Eschelon of UNE-platform lines it ordered from Qwest."[155] Other agreements addressed important provisioning issues, such as an agreement with Covad in which Qwest committed to meeting various operational and time parameters for provisioning interconnection and network elements that went beyond the service typically provided to other CLECs.[156] Qwest also offered selected CLECs more desirable dispute resolution and escalation procedures than it offered CLECs generally.[157]

In all, the ALJ concluded, "Qwest has committed 25 individual violations by failing to file, as required, 25 distinct provisions (found in 12 separate agreements) for interconnection, access to UNEs and/or access to services."[158] He further found that "[b]y not filing the 12 agreements discussed above, Qwest knowingly prevented other CLECs from picking and choosing their provisions. This demonstrates a hostility to the non-discrimination concept that raises serious questions about how Qwest will cooperate with local competition efforts in the future."[159] Finally, the ALJ found that the secret deals were part of a "pattern of anticompetitive behavior" intended to nullify Qwest's "§ 252 obligations."[160]

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third party OSS testing data upon which Qwest relies, or address the more general problems with the records in the section 271 proceedings caused by Qwest's purchase of CLEC silence.

[153] Minnesota ALJ Findings at 12 (describing agreement between Qwest and Eschelon providing "'that reciprocal compensation for terminating internet traffic shall be paid at the most favorable rates and terms contained in an agreement executed to date by U S WEST'").

[154] *Id.* at 21-23 (describing discount agreement between Qwest and Eschelon that "applied to all purchases made by Eschelon from Qwest").

[155] *Id.* at 24. This credit was initially $13 per line, *id.*, and was later increased to $16 per line in another agreement, *id.* at 25.

[156] *Id.* at 34-38.

[157] *Id.* at 17-20, 40-43.

[158] *Id.* at 52.

[159] *Id.* at 48.

[160] *Id.*

Beyond even the recent decision of the Minnesota ALJ, there is other evidence that Qwest has *not*, in fact, filed and posted on its website all of the requisite interconnection agreements for the states that are the subject of the Qwest III Application. Kenneth L. Wilson, a Consultant and Technical Witness with Boulder Telecommunications Consultants, LLC, conducted a review of the various agreements that have been placed on Qwest's website, have been made public in the various Qwest states, and have been at issue in the various state proceedings in Iowa, Minnesota, Colorado, and Arizona.[161] The summary of Mr. Wilson's review is contained in a matrix of 47 discriminatory agreements that were at some point part of Qwest's practice of engaging in secret deals. That evidence shows that while Qwest has posted 16 of these agreements on its website, numerous other agreements remain "secret" *to this day* – either unfiled or otherwise unavailable. These continuing secret agreements include 17 interconnection agreements that the ACC Staff has recommended be filed and made public, and 15 additional agreements that AT&T continues to argue also constitute interconnection agreements in the state proceedings.

At bottom, Qwest is asking the Commission to trust that it has *now* identified all of its "interconnection agreements" within the meaning of section 252(a) and filed *all* such agreements with state commissions, thus prospectively complying with its obligation to make the terms in these agreements available to other requesting carriers on a nondiscriminatory basis. This request must be dead on arrival. As explained above, Qwest must show that it currently complies with the checklist and cannot rely on mere paper promises to come into compliance with the Act's core market opening obligations. The Commission must reject the new application because Qwest has not demonstrated that all of the discriminatory agreements identified by the Minnesota ALJ and the ACC staff effective

[161] The Wilson Matrix is provided as Attachment 2. At AT&T's direction, Mr. Wilson has included only agreements that appear applicable in some or all of the nine states at issue in the Qwest III Application and that contain terms or conditions that he does not believe were made available to other CLECs. Interconnection agreements that should have been filed but do not appear to contain discriminatory terms were excluded. Mr. Wilson has provided only information that is publicly available. While Qwest has agreed to waive the confidentiality of these agreements, they remain confidential where AT&T has not been able to confirm the other party's willingness to waive confidentiality. AT&T expects that the ACC proceeding will conclude during the 90-day period for considering the Qwest III application, (continued)

in some or all of these nine states, some of which are referenced in the Wilson Matrix, have been filed and made available to other CLECs.[162]

Finally, the Minnesota proceeding establishes conclusively that Qwest's actions have inflicted substantial harm on competition by denying regulatory commissions access to information probative of Qwest's compliance with the competitive checklist. The ALJ found that:

> The testimony in this case from CLECs that were actually harmed by Qwest not making the unfiled agreement terms available to them demonstrates the harm caused by Qwest's intentional conduct to both customers and competitors. *It is impossible to calculate the damages to CLECs that have not been able to opt into the agreements, but it is certain that damages would amount to several million dollars for Minnesota alone.*[163]

The Minnesota ALJ also found that Qwest obtained agreements from CLECs not to participate in Section 271 proceedings. The ALJ specifically noted that Qwest "offered Eschelon financial incentives to (a) withhold information from regulators that may be relevant to Qwest's section 271 applications, and (b) covertly assist Qwest in manipulating various regulatory proceedings."[164] In particular, the ALJ noted that "[w]ith respect to Eschelon, Qwest had substantial service-related problems that apparently have not been addressed in a number of Minnesota dockets because of this neutrality agreement."[165] Relatedly, the ALJ found that Qwest gained substantial

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forcing these parties to end their campaign of secrecy. Of course, the FCC has the authority to require the filing of these agreements on a confidential basis at the FCC for its own review.

[162] AT&T previously has described Qwest's inadequate disclosure of agreements before the MDOC, the IUB, and the ACC. *See, e.g.,* Supplemental Comments of AT&T at 26-30, WC Docket No. 02-148, filed Aug. 28, 2002. Now, the Minnesota ALJ specifically has found that Qwest took deliberate steps to avoid disclosure of its secret deals and that a Qwest representative lied to the PUC about the existence of a discriminatory oral agreement in the course of testifying. In eight of the nine states at issue here, Qwest made no effort to identify and file secret agreements other than the multi-state agreements identified in Minnesota and Iowa. There is no way to verify Qwest's claim of checklist compliance because Qwest has not provided even any *examples* of agreements that were excluded, including those still being examined by the ACC; the Commission and parties are effectively disabled from discussing other "unfiled" agreements because these agreements that Qwest has been compelled to produce are subject to protective orders. All of the relevant information is in Qwest's possession, and Qwest has not provided it.

[163] Minnesota ALJ Findings at 52 (*emphasis added*).

[164] *Id.* at 46. Qwest's lack of candor in the Minnesota secret deals hearings is not the only incidence of such behavior. The Minnesota ALJ also found that Qwest entered into a secret deal with selected small CLECs whereby they were permitted to opt in to the terms of any of Qwest's operative interconnection agreements, and that in another docket "Qwest and the Small CLECs intentionally filed a misleading settlement document with the ALJ and the Commission that did not include the pick-and-choose provision." *Id.* at 39.

[165] *Id.* at 51.

economic advantages from its secret deals. These advantages included the "millions of dollars Qwest saved by not making the purchase volume discounts it agreed to with McLeodUSA and Eschelon available to other CLECs," and "agreements by two of Qwest's most active wholesale customers (Eschelon and McLeodUSA) to not participate in the consideration of whether Qwest should receive interLATA long distance authority under 47 U.S.C. § 271."[166]

III. QWEST IS NOT PROVIDING NONDISCRIMINATORY ACCESS TO ITS OPERATIONS SUPPORT SYSTEMS.

The same lack of candor that underlies its secret deals campaign infects – and fatally undermines – Qwest's claim that it is providing nondiscriminatory access to its operations support systems ("OSS"). Indeed, evidence has recently come to light that Qwest has intentionally hidden information from the Commission concerning critical aspects of its OSS, and has affirmatively misled the Commission regarding its ability to provide CLECs with information they need to compete. To support its assertion that its OSS "is performing well and provides CLECs with a meaningful opportunity to compete,"[167] Qwest claims that it provides CLECs with equal access to its loop qualification information and withholds no information regarding mechanized loop testing ("MLT"). In fact, a declaration from a former Qwest employee who performed such MLTs proves that Qwest *has* collected more MLT information that it has previously admitted and has even directed its personnel to conceal from the Commission the evidence that such tests were performed.

Although these evasions alone compel a finding that Qwest does not comply with this checklist item, they are not the only ground for such a finding. Without reiterating all of the myriad OSS problems AT&T identified in its response to Qwest's first section 271 applications,[168] it is

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[166] *Id.* at 52. The economic benefits gained by Qwest also included, at a minimum, "the withdrawal of CLECs from the consideration of the Qwest/U S WEST merger; . . a $150,000,000 purchase commitment from Eschelon; . . [a] purchase commitment from McLeodUSA; [and] the agreement by McLeodUSA to keep its telecommunications traffic on the Qwest network." *Id*.

[167] Qwest III at 6.

[168] In these comments, AT&T provides additional evidence to the extent that it involves OSS issues where new facts that have emerged since the *Qwest I* and *Qwest II* applications, or where a response to Qwest's previous submissions is (continued)

indisputable that Qwest continues to deny competitors the nondiscriminatory access to OSS that is so crucial to meaningful competition.[169] Qwest still denies CLECs access to all of the loop qualification information that it has in its possession, and denies CLECs the same ability to perform (or have performed) MLTs before actual provisioning that Qwest provides itself. In addition, Qwest's unique pre-ordering and ordering processes are unreasonably complex – thereby increasing the likelihood of order rejections – and continue to be plagued by high rates of order rejections, manual processing, and manual errors. And Qwest still does not provide a readable, accurate, and auditable wholesale bill. As in the past, moreover, the test environments offered by Qwest still fail to mirror production. On this record, Qwest cannot reasonably be found to be providing nondiscriminatory access to its OSS.

A. Loop Qualification.

Qwest has again failed to demonstrate that it provides nondiscriminatory access to loop qualification information needed by CLECs to offer advanced services like DSL. As a explained by a former Qwest employee, and as confirmed by internal Qwest documents, Qwest concealed from regulators (including Commission staff) evidence that it regularly collects mechanized loop testing ("MLT") data, that it has not demonstrated is available to CLECs. Amazingly, Qwest's own documents confirm that during a July 2002 visit by Commission Staff to a Qwest service center – *which took place while Qwest's Section 271 applications were pending and which was attended by Qwest's OSS declarants*[170] – Qwest "made an effort to diminish the visibility to MLT," giving its employees *explicit instructions to conceal* Qwest's MLT practices. This new evidence conclusively confirms that Qwest has no regard for the integrity of the Commission's rules and procedures, and that Qwest is not complying with its critical checklist obligation to provide CLECs with "the same

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warranted. With respect to other deficiencies in the OSS (such as Qwest's failure to demonstrate a pattern of compliance with its change management process), AT&T simply incorporates its previous submissions by reference.

[169] *See New York 271 Order* ¶ 83 ("The Commission consistently has found that nondiscriminatory access to OSS is a prerequisite to the development of meaningful local competition"); *Local Competition Order* ¶ 516 (OSS "represent a significant potential barrier to entry").

underlying information [about the loop] that the incumbent LEC has in any of its own databases or other internal records."[171]

As Qwest is well aware, MLT produces "loop qualification" information, including loop length data, that can be used by local carriers to determine, *inter alia*, what services can be provided over the loop (*e.g.*, the DSL speed, if any, of which the loop is capable). MLT is particularly important in the Qwest region because the information in Qwest's loop qualification databases that is available to CLECs is notoriously inaccurate.[172] Qwest has acknowledged, for example, that CLECs may receive information from those databases that erroneously advises that a particular loop can support a particular speed of DSL.[173] The competitive harm of such inaccurate information to CLECs trying to persuade new customers to switch service is self-evident.

Nor can Qwest claim that access to MLT information is not required. In fact, the Commission has expressly confirmed that nondiscriminatory access to OSS (checklist item 2) includes access to the type of loop qualification information contained in Qwest's MLT records.[174] And in subsequent section 271 orders, the Commission further clarified that the BOC must make all such information in its possession available to CLECs, regardless of whether the BOC's own retail personnel in fact use the information.[175] The Commission concluded that, because BOC retail personnel have the *right* to use any such loop qualification information, the Act's mandate of nondiscriminatory access requires that CLECs also have the same right to use any such information.[176] Even beyond the legal requirement of parity, full access to loop qualification information is a competitive necessity, because

[170] *See Ex Parte* Letter from Hance Haney to Marlene Dortch, WC Docket No. 02-189 (July 24, 2002).

[171] *UNE Remand Order* ¶ 427; *see also, e.g.*, *Georgia-Louisiana 271 Order* ¶ 112 (to show checklist compliance, BOC must prove that it "provides competitors with access to all of the same detailed information about the loop that is available to itself and in the same time frame as any of its personnel could obtain it").

[172] *See, e.g.,* Covad (Qwest II) Reply Comments at 24.

[173] *See e.g.*, Notarianni & Doherty Qwest I Dec. ¶ 116.

[174] *UNE Remand Order* ¶¶ 427-31.

[175] *See, e.g.*, *Kansas-Oklahoma 271 Order* ¶¶ 121-25; *Georgia-Louisiana 271 Order* ¶ 112; *Rhode Island 271 Order* ¶ 61; *Vermont 271 Order*, App. D. ¶ 35; *Alabama 271 Order* ¶ 141; *Massachusetts 271 Order* ¶ 54.

[176] *UNE Remand Order* ¶ 430.

a CLEC's ability to provide new innovative services is severely impaired without such information.[177]

Despite the Commission's clear rules, Qwest has long resisted providing MLT-generated data to CLECs. In state proceedings, Qwest falsely claimed that it did not run such tests in the pre-order stage. Later, in Qwest's prior section 271 proceedings, Qwest suggested that it did not *routinely* run such tests, but had done so more than two years ago and now makes that (stale) data available to CLECs.[178] Even when AT&T, Covad, and other CLECs showed that Qwest's loop qualification information, among other things, did not allow CLECs to obtain information on spare loop facilities, did not return information on loop conditioning, and generally provided inaccurate loop information, Qwest continued to claim that it was providing CLECs with *all* of the relevant information that it provided to itself.[179]

With regard to MLTs in particular, Covad asserted in the second Qwest 271 proceedings that Qwest runs MLTs on a monthly basis, but that the only data Qwest makes available to CLECs relates to loop length, even though an MLT generates hundreds of other data points.[180] Given the lack of information on the Qwest MLT process, Covad requested an audit of Qwest's operations to determine the scope of MLT testing and the loop qualification information available to Qwest personnel.[181] Covad also requested that Qwest be required to provide CLECs with all of the data obtained via the MLT.[182]

Qwest's reply comments and declarations submitted in support of its prior applications – upon which Qwest continues to rely in this proceeding – flatly denied these assertions. Qwest's declarants twice affirmed that "contrary to Covad's speculation, Qwest is not withholding MLT information

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[177] *Id.*

[178] Notarianni-Doherty Qwest II Reply Dec. ¶¶ 46, 56.

[179] *See*, *e.g.,* Qwest II Reply Comments at 33 ("Qwest meets the Commission's requirements for providing access to loop make-up").

[180] Covad (Qwest II) Comments at 26-27.

[181] *Id.* at 28-30.

[182] *Id.* at 33-34; *see also* Covad (Qwest II) Reply Comments at 25.

from CLECs."[183] And, in response to claims that MLT information was vital for CLECs, Qwest's declarants repeatedly claimed that other Qwest-supplied databases provided more accurate loop information and that "a Qwest MLT will not provide more detailed or more accurate loop make-up information."[184] They also claimed that the "MLT process that was used extracted only a subset of the MLT data (the telephone number, verification code, date and time, and loop length), not the 'almost one hundred data points' that Covad alleges are available."[185] In response to Covad's assertion regarding the frequency with which Qwest performed MLT and the information Qwest obtained from MLT, the Qwest's witnesses' evasive response was that Covad's claims were "not entirely accurate."[186]

It is now clear, however, that Qwest's declarations were *in*accurate, and that Qwest does in fact routinely conduct MLT to collect data that it does not make available to CLECs. Mr. Edward Stemple – a former Qwest employee[187] – testifies that, as one of his duties as service representative for Qwest, he was required to run MLTs for *each* line that was involved in a cut.[188] And the MLT does in fact return a very large number of data fields regarding the loop make-up.[189] This information was retained by Qwest. Mr. Stemple states that he was initially directed to cut and paste the entire results of the MLT into an "osslog" note, which was saved and which apparently could be accessed by other Qwest employees.[190] These facts directly contradict Qwest's prior claims, and provide powerful evidence that Qwest is running MLTs that it is not providing to CLECs – a clear

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[183] Notarianni & Doherty Qwest I Reply Dec. ¶ 50; Notarianni & Doherty Qwest II Reply Dec. ¶ 56.

[184] Notarianni & Doherty Qwest I Reply Dec. ¶¶ 44-45; Notarianni & Doherty Qwest II Reply Dec. ¶ 44-45.

[185] Notarianni & Doherty Qwest II Reply Dec. ¶ 47.

[186] *Id.* ¶ 50.

[187] Mr. Stemple was employed as a service representative by Qwest at its Qwest CLEC Coordination Center ("QCCC") in Omaha, Nebraska. Stemple Dec. ¶ 1. The duties of service representatives like Mr. Stemple included coordinating cuts from end-users switching their service from Qwest to a CLEC. *See id.* Mr. Stemple contacted AT&T shortly after Qwest's withdrawal of its Qwest I and Qwest II applications.

[188] *Id.* ¶¶ 1, 5.

[189] *Id.* ¶ 6.

[190] *Id.*

violation of its obligation to "provide[] competitors with access to *all* of the same detailed information about the loop that is available to itself."[191]

Qwest's failure to disclose the existence of its MLT process to the Commission Staff – and its corresponding checklist violation – was anything but inadvertent. As Mr. Stemple describes (and as Qwest's internal documents confirm), Qwest supervisors instructed the service representatives, who were to be observed during a visit by Commission Staff and other regulators to the QCCC in late July, 2002, to perform the cutover process *without* performing MLTs.[192] The Qwest supervisors instructed those service representatives *not* to bring up the MLT screen during the visit and *not* to raise the issue of MLTs.[193] Even worse, Qwest employees were apparently instructed by Qwest supervisors to lie to FCC Staff – Qwest supervisors instructed employees that, if the visiting FCC staff were to ask whether service representatives run MLTs, they should tell the FCC staff that Qwest does *not* run MLTs.[194]

When he raised concerns with his supervisor about lying to the FCC, a Qwest supervisor promptly told Mr. Stemple that he would be fired immediately if he revealed anything about the MLT process during the visit.[195] Faced with similar concerns of other employees, Qwest supervisors provided employees with an e-mail explanation of Qwest's improper instructions during the FCC visit. That e-mail (attached to Mr. Stemple's declaration) documents Qwest's intent to hide its MLT process from the Commission, and also confirms that Qwest is violating section 271 by withholding the MLT results from CLECs.

The document was written by Mary Pat Chesier, whom Mr. Stemple describes as the first in command at the Omaha QCC.[196] Ms. Chesier writes that, during the FCC visit, Qwest in fact made a

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[191] *Georgia-Louisiana 271 Order* ¶ 112 (emphasis added).
[192] Stemple Dec. ¶¶ 1, 9.
[193] *Id.* ¶ 9.
[194] *Id.* ¶ 9.
[195] *Id.* ¶ 11.
[196] *Id.* ¶ 12.

conscious effort to "diminish the visibility to MLT."[197] The reason for "diminish[ing] the visibility" of MLT, Ms. Chesier explained, was because CLECs had asked for "access to MLT," and Qwest did not "want to bring attention to it in front of the FCC," out of fear that the Commission may have a "tendency" to grant the CLECs' requests, which would be "unfavorable" to Qwest.[198] And contrary to Qwest's witnesses' claims that MLT was not accurate, Ms. Chesier emphasized that the "MLT test is critical to our success in providing quality service to our CLEC customers."[199] Ms. Chesier's e-mail makes it clear that Qwest took a "strong stance" against providing CLECs with access to MLT precisely because it provided competitively significant information that CLECs could use to compete against Qwest – and thus allowing access to MLT would be "detrimental to [Qwest's] business."[200]

This description of the Qwest document neither exaggerates it nor ignores important context, as review of the full text of the message makes clear:

> QCCC team,
>
> I would like to clarify an issue around the MLT testing and our FCC visit. We have made an effort to diminish the visibility to MLT during these visits for the sole purpose of protecting access to our legacy systems. Since we started 271 efforts, CLECs have been very vocal about us providing them access into our systems, process, CO's, data analysis, etc. Some of it we have been mandated to provide as a result of the Telecommunications act and the contracts we have with the CLECs.
>
> We have taken a strong stance that our legacy systems are proprietary and allowing competitors access to them could be detrimental to our business. To date we have been successful in winning this argument.
>
> CLECs have specifically asked for access to MLT. We believe this is a part of our legacy system we want to keep proprietary. As a result we don't want to bring attention to it in front of the FCC as they may have a tendency to respond to CLEC requests in a manner which may be unfavorable to us.

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[197] *Id.* ¶ 13; Stemple Att. 1.

[198] *Id.*

[199] *Id.*

[200] *Id.*

> The MLT test is critical to our success in providing quality service to our CLEC customers. The work you do in performing the MLT test is extremely important and the internal process focus and results are highly visible to the Network organization.
>
> Hope this eliminates any confusion.

Other evidence further confirms Mr. Stemple's testimony that Qwest is not providing CLECs with appropriate access to loop qualification information. For example, recent testimony by Qwest revealed that its engineering personnel have direct access its LFACs database – a database to which CLECs have no access, even though LFACS contains loop qualification information.[201] Qwest personnel also have access to information – to which CLECs also have no access – regarding the availability of fiber loops that have not yet been assigned.[202] The "loop qualification tools" that Qwest provides to CLECs do not contain this, and other, loop qualification information that CLECs need in able to determine whether they can provide advanced services over a particular loop.[203]

B. CLEC Ability To Perform Mechanized Loop Testing.

From a competitive standpoint, the ability of CLECs to perform (or have performed) MLTs during the pre-order stage is critical. Without that ability, CLECs can neither determine (while the customer is on the line) the ability of the customer's loop to support the services the customer requests, or the accuracy of the loop qualification information which Qwest makes available to CLECs.[204] As previously discussed, Qwest itself has characterized the pre-order MLTs performed by QCCC personnel as "critical to [its] success in providing quality service."[205]

Qwest, however, refuses to give CLECs the ability to perform MLTs (or have MLTs performed, at the CLEC's request) – even though Qwest can, and does perform, MLTs in its retail operations (and apparently at the QCCC as well). Qwest has acknowledged that it performed MLTs

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201 Qwest III Finnegan/Connolly/Wilson Dec. ¶ 27.
202 *Id.* ¶ 30.
203 *Id.* ¶¶ 25, 30.
204 *Id.* ¶ 32.
205 Stemple Dec., Att. 1.

in its retail operations in the areas where it determined it would operate its "Megabit" service. Qwest apparently continues to perform such tests today, in order to "update" information on loop lengths.[206]

None of Qwest's rationalizations for its failure to provide this information withstands scrutiny. Qwest claims that the "loop qualification tools" that it offers to CLECs are more comprehensive and accurate than information produced by MLTs. But Mr. Stemple's testimony belies Qwest's contention that the loop qualification tools contain all of the MLT information in Qwest's possession. And, in any event, the evidence in Qwest 271 proceedings shows that the MLT information in the loop qualification tools is incomplete and not fully inaccurate.[207] Although Qwest suggests that its newly-adopted manual search process would suffice to meet the CLECs' needs, that process is untested and its effectiveness in commercial operation remains to be determined. The manual search process also would not eliminate the CLECs' need to verify the accuracy of the loop qualification information provided by Qwest.[208]

C. The Complexity of Qwest's Pre-Ordering and Ordering Processes.

Qwest's pre-ordering and ordering processes are far more complex than those of other BOCs. The differences between Qwest's processes, and those adopted by other BOCs, are striking. Collectively, they impose substantial burdens and costs on CLEC, and explain the extraordinarily high rejection rates associated with Qwest's systems.

These differences are best illustrated by comparing the steps that a CLEC must take to switch a Qwest customer over to the CLEC's service with the steps that the CLEC would take to switch a customer from any other BOC. First, in every region other than Qwest's, the CLEC can pull up the Customer Service Record ("CSR") for the customer simply by typing in the customer's telephone number (or the circuit number, if no telephone number currently exists). For a Qwest customer,

[206] *Id.* ¶ 33.
[207] *Id.* ¶¶ 36-37.
[208] *Id.* ¶¶ 40-41.

however, the CLEC must also type in the customer's name and address.[209] This additional requirement both slows down the record retrieval process and increases the possibility that a typographical or other error will further delay record retrieval. These delays not only increase the costs and reduce the productivity of the CLEC's service representative, but can also can irritate the customer, who is typically on the line during this process.

These delays are increased by the fact that the design of Qwest's systems, unlike that of every other BOC, does not allow a CLEC to readily make an automatic wholesale transfer of customer data from the CSR to the Local Service Request ("LSR"). Instead, because Qwest bases its design of the CSR on the USOCs for the various products and services ordered by the customer, a CLEC service representative must search through the CSR to find individual data items to "auto-populate" it onto the LSR. This process is so cumbersome that AT&T has been forced to populate the data manually.[210]

Similarly, unlike every other BOC, Qwest's system does not include "telephone number migration," under which the CLEC simply enters the customer's telephone number on to the LSR for a UNE-P order. Instead, the CLEC must also enter the customer's name and address, a wholly unnecessary requirement that both slows down the process and increases the chance of errors that will ultimately result in order rejection.[211] Further complicating the process, Qwest, unlike all other BOCs, requires the CLEC to include not only a Class of Service Code that corresponds to UNE-P service, but also a separate Class of Service Code for the *retail* service that the customer has been taking from Qwest – information that the CLEC can only obtain by finding it among the numerous data items on the CSR.[212] Finally, Qwest, along among the BOCs, requires CLECs to differentiate, on a migration-as-specified order, between the services that the customer has been taking from Qwest

[209] *Id.* ¶¶ 43, 46.
[210] *Id.* ¶¶ 44, 47; AT&T (Qwest II); AT&T (Qwest II) Finnegan/Connolly/Menezes Dec. ¶¶ 137-138.
[211] *See id.* ¶¶ 45, 48, 52; *Texas 271 Order* ¶ 160 (finding that TN migration can "virtually eliminate address-related rejects received by competing LECs on most types of orders"); *Georgia/Louisiana 271 Order* ¶ 125 (finding that BellSouth's implementation of TN migration had "reduced the percentage of rejected orders, especially address related errors").

(and wishes to retain), and additional services that the customer is taking for the first time from the CLEC. Thus, while a CLEC may use a single code for all features (signifying that a migration is occurring) when migrating service from any other BOC, it must to use two different codes ("V" for migrate, and "N" for new) and assign the proper code to each feature listed on the LSR when migrating a customer from Qwest.[213]

Qwest's unique requirements impose substantial and wholly unnecessary additional burdens and costs on CLECs, requiring them to ascertain additional information regarding the customer and use additional codes, all of which significantly increase the likelihood of order rejections due to erroneous entry of unnecessary and atypical data.[214] Not surprisingly, these impediments have had a direct and adverse impact on AT&T. Because of the difficulties presented by Qwest's design of the CSR, and by Qwest's requirement that the customer's Retail Class of Service Code be included on the LSR, AT&T has determined that the costs of using the EDI interface to submit UNE-P orders outweigh the benefits.

Thus, AT&T has been forced to use Qwest's GUI interface to conduct pre-ordering and ordering transactions for UNE-P orders – even though that interface puts AT&T at a competitive disadvantage, since it is not integratable with AT&T's systems. AT&T representatives must perform pre-order queries using Qwest's GUI interface and, once a query returns a valid response, AT&T must retype the information into AT&T's internal ordering interface. To do this, AT&T representatives must have AT&T's internal ordering interface and Qwest's GUI interface both open and active and switch back and forth between the two interfaces. The need for AT&T representatives to retype GUI information into the AT&T ordering interface results in increased costs, delays, and

[212] AT&T (Qwest III) Finnegan/Connolly/Wilson Dec. ¶¶ 45, 48, 53.
[213] *Id.* ¶¶ 50-53.
[214] *Id.* ¶ 54; AT&T (Qwest III) Finnegan/Connolly/Wilson Dec. ¶ 141.

errors for AT&T that are not experienced by Qwest's retail operations, which use fully integrated systems.[215]

Qwest itself has recognized that many of these aspects of these systems are unnecessary. Qwest has agreed, for example, to implement TN migration, eliminate the requirement that CLECs differentiate between "retained" and "new" services, and eliminate the existing requirement that CLECs enter name and address information in order to retrieve a CSR. Those changes, however, will not be implemented until at least April 2003. And even if the changes are implemented successfully at that time, Qwest's systems will still retain features that make them unnecessarily complex, such as the design of the CSR, which precludes an automatic en masse transfer of data from the CSR to the LSR, and the requirement that a Retail Class of Service Code be included on the LSR. Until *all* of these unnecessary impediments are removed, Qwest cannot reasonably be regarded as giving CLECs a meaningful opportunity to compete.[216]

D. Rejection Rates, Manual Processing Rates, and Manual Errors.

Also unsurprising, the foregoing design flaws and unnecessary requirements of Qwest's systems results in high rates of order rejections, manual processing of non-rejected electronically submitted orders, and manual errors.[217] In August 2002, Qwest's systems rejected about one of every three of the orders submitted by CLECs using Qwest's electronic interfaces. These rejection rates, which are directly attributable to Qwest's own design decisions, are unacceptably high.

Qwest's total flow-through rates also continue to substantially underperform. At least one out of every four – and often more than half (depending on the type of order and interface used) –of all electronically submitted LSRs fall out for manual processing.[218] Even worse, overall rates of manual processing have actually *increased* since last May in four of the nine states covered by Qwest's

[215] *Id.* ¶¶ 56-58.
[216] *Id.* ¶ 56-58.
[217] *See id.* ¶¶ 59-63; AT&T (Qwest II) at 41-43.
[218] AT&T (Qwest III) Finnegan/Connolly/Wilson Dec. ¶ 64.

application. In two of those states, half of all electronically-submitted orders fall out for manual processing.[219] These high rates of manual processing substantially increase the likelihood of delays and errors in provisioning that are not experienced by Qwest's fully-automated retail operations.[220] As in the case of order rejections, Qwest cannot attempt to blame its low flow-through rates on "CLEC errors," since such errors are excluded from its reported performance data.[221]

Qwest's latest application also provides no reliable evidence to contradict the findings of KPMG's third-party testing that Qwest commits numerous errors in manually processing CLEC orders. The performance data that Qwest cites are based on performance measurements that were unilaterally developed by Qwest, are unduly narrow, and are otherwise unreliable. Furthermore, even the data that Qwest reports under its crabbed interpretation of "service order accuracy" shows unacceptable performance.[222]

E. Billing.

As part of its burden of showing that it provides nondiscriminatory access to its OSS, Qwest "must demonstrate that it can produce a readable, auditable, and accurate bill."[223] Qwest's bills, however, fall woefully short of that requirement.

Qwest's bills are not remotely auditable. Although Qwest has provided electronic bills to AT&T in the industry standard BOS/BDT format since July 1, 2002, it continues to generate these bills from its non-standard Customer Record Information System ("CRIS"). Qwest's use of CRIS precludes AT&T from auditing the wholesale bills that it receives, because the CRIS bills differ in the level of detail depending upon which of Qwest's three billing centers issued them. In fact, the level of detail provided by some of those centers is, by itself, insufficient to permit auditing

[219] *Id.* ¶ 65.
[220] AT&T (Qwest II) Finnegan/Connolly/Wilson Dec. ¶¶ 162-163. Given the delays inherent in manual processing, it is not surprising that Qwest changes due dates far more frequently for CLEC orders than for its own retail orders. The higher rates of postponed installations, and the resulting customer dissatisfaction, denies CLECs a meaningful opportunity to compete. AT&T (Qwest III) Finnegan/Connolly/Wilson Dec. ¶¶ 71-72.
[221] *Id.* ¶¶ 65; AT&T Qwest II at 42 n.108.
[222] *Id.* ¶ 66-70.

altogether.[224] In addition, Qwest has limited the value of the BOS/BDT format by deviating in several significant respects from that format. These deviations, both individually and collectively, preclude the bills from being audited in a meaningful way, while increasing the likelihood that the bills will be inaccurate.[225]

The CRIS BOS BDT bills that AT&T has received for July, August, and September 2002 confirm that Qwest's bills thwart CLEC efforts to audit them. Each of those bills received by AT&T was riddled with errors and omissions. Amazingly, each bill contained total charges that were out of balance with the paper version of the bill. The total recurring charges on the bill also were inconsistent with the data on the customer service records. As a result of the deficiencies in the bills, AT&T could not process them or even determine how much it actually owed to Qwest without contacting Qwest for assistance.[226] Since it first received the July bill, AT&T has brought these errors to Qwest's attention. But Qwest still has not corrected the problems.[227] Even Qwest has effectively acknowledged that the CRIS BOS BDT bills are so flawed that they are neither auditable nor accurate. Less than one month ago, Qwest advised CLECs on two occasions that the CRIS BOS BDT bill could *not* serve as the bill of record, because it was "out of balance" and still "under development."[228]

Qwest's claim that CLECs can audit CRIS bills simply by using Qwest's alternative ASCII or EDI formats, rather than the BOS/BDT format, is unrealistic and unreasonable.[229] The Commission itself has recognized that "offering BOS BDT bills is important to offering competitors a meaningful

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[223] *Pennsylvania 271 Order* ¶ 22.

[224] AT&T (Qwest III) Finnegan/Connolly/Wilson Dec. ¶ 78. Qwest's various attempts to explain away the lack of detail in the bills issued by its Central Region as "immaterial" do not withstand scrutiny. For example, contrary to Qwest's assertion, the lack of detail appears in both the paper *and* electronic versions of the CRIS bills issued by that region. *Id.* ¶ 79.

[225] *Id.* ¶¶ 80-91.

[226] *Id.* ¶¶ 99-102.

[227] *Id.* ¶¶ 101-103-104.

[228] *Id.* ¶¶ 105 & Att. 10.

[229] *Id.* ¶ 87-88. Not all of the other RBOCs offer electronic billin ASCII or EDI format. *Id.* ¶ 88.

opportunity to compete."[230] Because BOS/BDT is the only industry standard format offered by all RBOCs, the use of the ASCII or EDI format in the Qwest region would require AT&T and other large-volume CLECs operating on a national scale to build different systems for different RBOCs to receive, translate, and handle the bills that they receive. Neither AT&T nor any other CLEC operating nationwide should be required to incur such expense, when it can build a single system suitable for all RBOC regions by receiving bills in the BOS/BDT format. Furthermore, bills issued in ASCII or EDI format could not be audited using existing commercially available software (Qwest's hyperbole and rhetoric notwithstanding) unless a CLEC developed additional software – an undertaking that would be expensive and time-consuming.[231]

Qwest also has plainly failed to provide wholesale bills that are even close to being accurate. In addition to the above-mentioned flaws in the CRIS BOS BDT bills, the bills that Qwest has sent to AT&T persistently contain numerous errors, several of which were brought to Qwest's attention more than six months ago. Qwest, however, has not fixed those errors, many of which continue to appear on the bills that AT&T receives. These errors have required AT&T to substantial time and cost (in attempting to resolve them with Qwest) and threaten to jeopardize AT&T's reputation with its customers.[232]

F. Test Environment.

Qwest does not provide a "stable testing environment that mirrors production."[233] As one example, Qwest's Stand-Alone Test Environment ("SATE") does not mirror the production environment, because: (1) SATE supports only a subset of the products and transactions that are available in the production environment; (2) the responses that are generated in SATE may be

[230] *Pennsylvania 271 Order* ¶ 23 n.80. Although Verizon (like Qwest) was providing CRIS BOS BDT billing at the time it filed its Section 271 application for Pennsylvania, there is no evidence that Verizon's bills shared the same numerous deficiencies as Qwest' bills, including the substantial deviation of Qwest's BOS/BDT format from industry standards. Moreover, unlike Qwest's bills, the Verizon CRIS BOS BDT bills had been subjected to third-party testing and had shown significant improvement since their original issuance.

[231] AT&T (Qwest III) Finnegan/Connolly/Wilson Dec. ¶¶ 92-95.

[232] *Id.* ¶¶ 107-114.

different from those in the production environment; and (3) SATE, unlike the production environment, requires users to choose a "path' for the response that will determine the time within which the response is returned.[234]

The deficiencies in SATE are likely to continue for the indefinite future, particularly given the inadequacies of Qwest's deficient procedures for allowing CLECs to request changes to SATE. SATE still supports less than half of the products that Qwest offers in the production environment.[235] And although Qwest has asserted that CLECs can submit a change request to include additional products in SATE, that procedure has already proven to be cumbersome, and time-consuming. Two change requests submitted by AT&T last December will not be implemented until April 2003 at the earliest – more than 15 months after their submission. Similarly, none of the change requests that Qwest filed in early 2002 for inclusion of additional products in SATE has been implemented. Like the failure of SATE to support all products offered in production, these delays inhibit the CLECs' inability to offer additional products in the production environment.[236]

G. Qwest's Performance Data Do Not Demonstrate Checklist Compliance.

As the Commission has acknowledged, "proper performance measures with which to compare BOC retail and wholesale performance, and to measure exclusively wholesale performance, are a necessary prerequisite to demonstrating compliance with the Commission's 'nondiscrimination' and meaningful opportunity to compete standards."[237] In order to prove that nondiscriminatory access is actually being delivered to CLECs, Qwest must provide performance data demonstrating that the access being provided to CLECs is "substantially the same"[238] as the access it provides to its own

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[233]*See Georgia/Louisiana Order* ¶ 179; AT&T (Qwest II) Finnegan/Connolly/Menezes Dec. ¶¶ 80-121.

[234] AT&T (Qwest II) at 36-37; AT&T (Qwest III) Finnegan/Connolly/Wilson Dec. ¶ 116.

[235]AT&T (Qwest III) Finnegan/Connolly/Wilson Dec. ¶¶ 120-121.

[236] *Id.* ¶¶ 118-119. Qwest's procedures for including additional error messages to SATE are equally illusory. Because Qwest makes available only a limited amount of resources for changes to SATE, CLECs can achieve the coding of additional error messages in SATE only by foregoing the implementation of the vast array of functionality, products, and features that SATE currently does not support. *Id.* ¶ 122.

[237] *Michigan 271 Order* ¶ 204 (citation omitted).

[238] *New York 271 Order* ¶ 44, 85; *Rhode Island 271 Order,* Appendix D, ¶¶ 36-38.

customer service representatives in terms of availability, timeliness, accuracy and completeness. Moreover, before Qwest can rely on its own self-reported performance data to determine checklist compliance, it must show that its performance measures accurately measure performance, and that its performance results are "above suspicion."[239] As AT&T demonstrated in its comments on Qwest's previous applications, Qwest has not met its burden. This remains true today.

Like its previous applications, Qwest' current application provides no reliable evidence that its data are accurate and show checklist compliance. In an effort to refute the pool of evidence showing that it relies excessively on and commits numerous errors during the manual processing of orders, Qwest cites its self-reported data for two measures: (1) PO-20 (Service Order Accuracy) and (2) a measure that Qwest refers to as "Service order Accuracy – via Call Center data" (Call Center measure"). However, these ill-conceived measures that Qwest unilaterally adopted without prior input from the CLECs are not reliable indicators of Qwest's actual performance in manually processing CLEC orders.[240]

Qwest's PO-20 measure is so limited in scope that it cannot legitimately be relied upon by this Commission as a meaningful measure of Qwest's performance in handling manually-processed orders. In this regard, a number of fields that Qwest examines under PO-20 are related to the customer's address. However, because of front-end edits in the Service Order Processor and secondary checks by Qwest's provisioning personnel and systems, it is highly unlikely that a random sample of Qwest's orders will contain errors in the address-related fields.[241] In stark contrast, PO-20 fails to capture critical information that is absolutely essential to assess the accuracy with which Qwest processes orders that fall out for manual intervention, including the USOCs and field identifiers that identify the services and features requested by the customer. Because PO-20 examines address-related fields, rather than fields that are more prone to human error (*e.g.* features

[239] *Texas 271 Order* ¶429.

[240] AT&T (Qwest III), Finnegan Dec. ¶¶ 10-33.

[241] *Id.* ¶ 22.

and services), the PO-20 measurement is biased in Qwest's favor and overstates its actual performance.[242]

Qwest cannot fill this gap by relying on data for its new Call Center measure which purportedly provides additional information regarding Qwest's service order accuracy and reports "discrepancies" which are not captured in its OP-5 measure on new installation quality. The Call Center measure not only fails to capture misses in provisioning features requested by the customer, but it also improperly measures the percentage of calls received on all electronically-submitted orders, rather than manually-submitted orders. Critically, neither the Call Center measure nor the OP-5 measure will capture a customer's out of service condition which is resolved through a new service order, rather than a trouble report. As a consequence, Qwest cannot legitimately contend that the data in its application accurately reflect its actual performance.[243]

Remarkably, even Qwest's own reported results do not demonstrate compliance with the competitive checklist. Even accepting the validity of the data that are reported – which is plainly unwarranted for the reasons discussed above – Qwest's own performance reports are littered with performance failures demonstrating that Qwest has failed to perform at parity or provide CLECs with a meaningful opportunity to compete.[244]

Qwest's rejection rates remain unreasonably high by any commercial standard. For example, in August 2002, approximately 30 percent of CLEC orders were rejected by Qwest's systems. These unacceptably high rejection rates increase CLEC costs and increase the risk that orders will not be completed by the due date.[245]

Qwest's flow through rates are wholly inadequate, and, in some cases, indicate instability and deteriorating performance. In particular, based upon Qwest's regionwide data, the total flow through

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[242] *Id*.
[243] *Id*. ¶¶ 28-33.
[244] *Id*. ¶¶ 34-122.
[245] *Id*. ¶ 36.

rates for Unbundled Loop and UNE-P POTS orders submitted over EDI, as well as LNP orders, have declined since May 2002. Moreover, since May 2002, Qwest's own reported results show that the rates of manual processing actually increased in four of the nine states included in Qwest's application. Qwest's own data also show that it fails to issue jeopardy notices in a timely fashion, and that the rates of due date changes on CLEC orders are substantially higher than those on retail orders.[246]

Qwest also fails to provision CLEC orders within the same amount of time and the same degree of quality that it provisions the same or comparable services for its retail customers.[247] Significantly, notwithstanding Qwest's stated promises that its training programs and revised provisioning documentation would assure improved performance in its provisioning of EELs, Qwest's own commercial results show that these promises cannot be credited. Qwest's most recent performance results continue to show that Qwest has failed in meeting installation commitments for EELs.[248]

Additionally, Qwest's own data show that it has not provided CLECs with nondiscriminatory access to its repair and maintenance OSS functions.[249] Thus, Qwest's performance data show that it has failed to perform at parity in resolving troubles reported by CLECs on line sharing and other orders. The reported results also show that Qwest's performance in meeting repair appointments has been both discriminatory and erratic.[250]

In its previous applications, Qwest has insisted that system improvements would reduce errors in and improve the timeliness of its bills issued to CLECs. However, Qwest's own commercial results continue to show that CLEC bills are neither accurate nor complete.[251] For all of these

[246] *See id.* ¶¶ 39-42, 62-63, 71-74, 84, 86, 98, 106.
[247] *Id.* ¶¶ 43-48, 64-65, 67-68, 90, 108, 120.
[248] *Id*. ¶¶ 49-51, 100, 107.
[249] *Id.* ¶¶ 56-59, 75-78, 81, 91, 110, 116.
[250] *Id*. ¶¶ 53, 109.
[251] *Id*. ¶¶ 61, 69-70, 79-80, 82-83, 85, 92, 117, 121-22.

reasons, Qwest's self-reported data show that it has not met and cannot meet its burden of proving that its data are accurate and demonstrate statutory compliance.

IV. QWEST'S RECURRING AND NON-RECURRING RATES DO NOT SATISFY CHECKLIST ITEM TWO.

Qwest has never seriously claimed that its UNE rates in 8 of the 9 states for which it seeks 271 approval are based on TELRIC-compliant cost studies. Nor could it. As demonstrated by AT&T in response to Qwest's first two section 271 applications for these states (and as demonstrated again in the attached declarations of AT&T's pricing witnesses), it is quite obvious that the Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming commissions all failed to apply TELRIC principles and approved UNE rates that far exceed any reasonable TELRIC range.[252]

Unable to defend its rates in these eight states on the merits, Qwest has scrambled to unilaterally implement a series of last minute rate reductions and claims that the new rates, as reduced, satisfy the Commission's benchmarking analysis, using Colorado as the benchmark state.[253] The problem with Qwest's claims however, is that Colorado is not a valid benchmark state. As demonstrated by AT&T in response to Qwest's prior applications, Qwest's Colorado nonrecurring costs and Qwest's Colorado recurring switching and loop costs are inflated by myriad clear TELRIC errors.

Even if (contrary to fact) Colorado were a valid benchmark state, the rates in many of the states covered by Qwest's application do not pass a proper benchmarking analysis. Qwest's benchmarking approach is fundamentally flawed, because it relies on standardized usage assumptions

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[252] *See* AT&T (Qwest III), Baker/Starr/Denney Dec. (rates in Qwest I states are not TELRIC-copmliant); AT&T (Qwest III) Mercer/Chandler Dec. (switching rates in Colorado and Qwest II states are not TELRIC-compliant); AT&T (Qwest III) Mercer/Fassett Dec. (loop rates in Colorado and Qwest II states are not TELRIC-compliant); AT&T (Qwest III), Weiss Dec. (non-recurring rates in Qwest states are not TELRIC-compliant).

[253] Qwest began implementing these unilateral rate reductions only a month before filing its first wave of applications. To a large extent, these changes are only temporary, and are subject to change, as is illustrated by the fact that Qwest has continuously changed those rates since it initially began filing section 271 applications – the most recent rate change occurred on September 30, 2002 when Qwest adjusted it switching rates in eight states. Qwest has offered the Commission no assurances that CLECs will continue to have access to the new rates implemented by Qwest after this proceeding is completed. Nor can the Commission rationally rely on the state commissions to ensure that Qwest's (continued)

rather than state-specific usage assumptions, and also fails to account for the fact that the Commission's Synthesis cost model cannot reasonably be used to compare costs for transport and tandem switching between very rural states (*e.g.,* Montana, North Dakota, Nebraska, and Wyoming) and less rural states (*e.g.* Colorado). When the benchmarking comparisons are done properly, Qwest's Washington and North Dakota non-loop rates are as much as 14% higher than Colorado rates, on a fully cost-adjusted basis, and Qwest's switching rates in the more rural states are as much 27% higher than those in Colorado, on a cost-adjusted basis.

Finally, even aside from the problems discussed above, there is separate and independent evidence that the UNE rates in Montana and Washington violate Checklist Item 2. Accounting for all possible potential revenues that may be available to new entrants – including interLATA toll contributions, intraLATA toll contributions, and state and federal universal service revenues – revenues are not sufficient to cover an efficient new entrant's costs in those states. This is true, even after accounting for possible entry strategies that include a mix of UNE-based services and resale service. In addition, Qwest's deaveraging methodology in Montana and Wyoming further precludes competitive entry by making it extremely difficult for potential entrants to identify in which UNE zones customers reside.

A. Colorado Is Not A Valid Benchmark State.

The record in the proceedings on Qwest's prior applications, demonstrates that Qwest's Colorado UNE rates – including Qwest's switching, loop and nonrecurring rates – were based on cost studies that, by their own terms, violate fundamental TELRIC principles and fall far outside the range that any reasonable application of TELRIC principles would produce.[254] With one exception,[255] Qwest's new application is based on these same inflated Colorado UNE rates. Accordingly, AT&T

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recurring and non-recurring rates will be set at cost-based levels in future rate proceedings – in the more than six years since the Act was passed, these states have *never* established TELRIC-compliant rates.

[254] *See, e.g.,* AT&T (Qwest I), Mercer/Fassett Dec.; AT&T (Qwest I), Mercer/Chandler Dec.; AT&T (Qwest I), Weiss Dec.; AT&T (Qwest II), Mercer/Fassett Dec.; AT&T (Qwest II), Mercer/Chandler Dec.; AT&T (Qwest II), Weiss Dec.; AT&T (Qwest II), Mercer/Fassett Supp. Dec.

incorporates its prior filings by reference, and also is submitting updated expert testimony in this proceeding that fully explains and quantifies each of those TELRIC-errors, and provides the Commission with an updated status of those issues.[256]

There is, however, an additional TELRIC error that inflates Qwest's Colorado UNE loop rates that AT&T only recently discovered. One critical input used in the HAI 5.2a Model reflects the forward-looking costs of Qwest's network operations (*i.e.,* the costs of managing a local telecommunications network that are not accounted for on a plant-specific basis).[257] To estimate those costs, the HAI Model starts with embedded total expenses from Qwest ARMIS accounts. But those embedded figures obviously must be adjusted, *inter alia*, to reflect all forward-looking efficiencies and to remove non-TELRIC costs, including costs that are specific to *retail* operations, expenses associated with Qwest's non-regulated activities, and costs that already are recovered by Qwest through non-recurring charges, recurring rates, and collocation charges.[258] The model must therefore multiply the sum of the embedded accounts by a forward-looking network operations factor. More specifically, the sum of Qwest's embedded network operations costs is divided by the total lines in the network to develop a *per line* expense, which is then multiplied by the forward-looking network operations factor. Thus, unlike other expenses in the HAI Model, the network operations expense is a dollar value (not a percent) and, therefore, the network operations expense does not vary with the level of investment or direct expenses. Accordingly, failure to apply the

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[255] Qwest eliminated its vertical features charge in Colorado.

[256] *See* AT&T (Qwest III), Mercer/Fassett Dec. (loop), Mercer/Chandler Dec. (switching), Weiss Dec. (non-recurring charges).

[257] *See* AT&T (Qwest III) Denney Dec. ¶ 5. Network operations expenses include: (1) costs incurred in provisioning material and supplies, including office supplies; (2) the cost of electrical power used to operate the telecommunications network; (3) the cost of activities such as controlling traffic flow, administering traffic measuring and monitoring devices, assigning equipment and load balancing, collecting and summarizing traffic data, administering trunking, and assigning interoffice facilities and circuit layout work; (4) costs incurred in testing telecommunications facilities from a testing facility to determine the condition of plant; costs incurred in the general administration of plant operations; and (5) costs incurred in the general engineering of the telecommunications plant which are not directly chargeable to an undertaking or project.

[258] *See* AT&T (Qwest III) Denney Dec. ¶¶ 7-9.

forward-looking network operations factor would have the effect of allowing Qwest to recover embedded costs, in clear violation of the Commission's TELRIC rules.

That is precisely what happened in Colorado. Although both Qwest and AT&T and other proponents of the HAI Model proposed a per-line additive of about $0.96/line for certain network operations expenses (which the HAI Model computed by applying a 50% forward-looking network operations factor to the embedded Qwest data), the Colorado PUC approved a per-line additive of nearly *double* that amount – equivalent to a patently excessive forward-looking network operations factor of 96 percent.[259]

Thus, the UNE loop rates adopted by the Colorado PUC (and used as the benchmark for all of the other Qwest rates) assume that Qwest's forward-looking Network Operations expenses are nearly equivalent to – rather than half of – Qwest's embedded Network Operations expenses. The clear TELRIC violation is starkly confirmed by Qwest's own proposal in the state proceedings and the CPUC's stated intent to endorse the Qwest proposal. Qwest's costs studies included a "network operations factor" linked to three of Qwest's Network Operations ARMIS accounts: (1) Network Administration (Account 6532); (2) Plant Operations Administration (Account 6534); and (3) Engineering (Account 6535). Qwest's cost studies estimated per line costs of $0.96 from these three accounts.[260] The CPUC stated that "[t]he network operations expenses as used in the Qwest model are acceptable."[261] Rather than adopt Qwest's $0.96/line proposal, however, the CPUC used the HAI Model, but inexplicably left out the 50 percent forward-looking factor necessary to replicate the Qwest result. The CPUC apparently did so in reliance upon Qwest's claims that notwithstanding its agreement with the $0.96 figure produced by the HAI 50 percent factor, there should be *no* forward-looking discount.[262] Thus, it appears that CPUC was misled by Qwest – the CPUC meant to adopt a

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[259] *See* AT&T (Qwest III) Denney Dec. ¶ 9.

[260] *See id.* ¶ 10.

[261] *577T Order* at 62.

[262] Qwest claimed that although "Qwest's network operations expenses in Colorado declined between 1995 and 1997" those costs "have remained steady since then," and "[b]ecause the HAI Model starts with 2000 data it already accounts (continued)

discount similar to that reflected in Qwest's model, but based on Qwest's erroneous arguments, the CPUC adopted a much lower discount that produced a per line additive of $1.85[263] – nearly double the value proposed by Qwest.

Similarly, the Colorado PUC erroneously adopted a $0.70 recurring loop additive to account for other network operations costs – *i.e.,* power and testing. Even Qwest's cost model estimates that power and testing add only $0.46 to loop costs; the HAI Model estimates a similar amount.[264] Thus, Qwest's Colorado loop rates are inflated by an additional $0.24 ($0.70 - $0.46), for a total of $0.89 ($1.85 - $0.96) + $0.24 = $1.13.[265] Loop cost overstatements of that magnitude are far too large to ignore and they preclude any finding of checklist compliance for Colorado loop rates or the use of those loop rates as benchmarks for other Qwest states.

B. Qwest's Montana, North Dakota, Nebraska, Washington, and Wyoming UNE Rates Do Not Satisfy The Commission's Benchmarking Analysis, Using Colorado As The Benchmark State.

Qwest's switching and total non-loop benchmarking analysis is fundamentally flawed because it is based upon invalid minutes of use and fails to account for overstated cost differences associated with transport and tandem switching. Those conclusions are largely unchanged, even after Qwest's most recent changes to its switching rates. Moreover, the Commission should reject Qwest's loop benchmarking analysis for Montana and Wyoming out of hand, because the benchmarking analysis masks the underlying TELRIC errors.

Minutes of Use. As demonstrated in the attached declaration of Michael Lieberman and Brian Pitkin, a benchmarking analysis using state-specific minutes of use conclusively shows that the switching rates in five states (and total non-loop rates in two states) fail the Commission's benchmarking test. Not surprisingly, Qwest's benchmarking analysis relies on a different set of

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for cost reductions achieved since 1995." *577T Order* at 62. In fact, the historical evidence confirms steady declines – between 2000 and 2001, for example, Qwest's network operation costs declined by an additional 10.6 percent. *See* Denney Dec. ¶ 10.

[263] *See* AT&T (Qwest III) Denney Dec. ¶ 10.

[264] *See id.* ¶ 11.

minutes, that Qwest concedes are not state-specific. Qwest has defended its use of non-state-specific minutes by pointing out that benchmarking comparisons require the state-specific minutes data (available from ARMIS) to be divided between interoffice and intraoffice minutes, and noting that Qwest has not made data showing that state-specific allocation available to CLECs or to the Commission.[266] Because AT&T and other CLECs do not have access to Qwest's state-specific interoffice vs. intraoffice minutes of use allocations, Qwest contends that a benchmarking comparison which uses state-specific total minutes and estimated state specific intraoffice/interoffice allocations is imperfect. The Commission has no choice in these circumstances, Qwest concludes, but to rely upon Qwest's standardized comparisons. The Commission should give Qwest's argument no weight.

As an initial matter, the premise of Qwest's claim – that allocating state-specific minutes using non-state-specific (but reasonable) allocation assumptions might change the outcome of the benchmarking analyses in this proceeding – is wrong. In reality, changing the allocations that are applied to the state-specific minutes does not change the conclusions of any of the benchmarking analyses. Whether 100% or 0% of state-specific minutes are allocated to intraoffice minutes, the results of the benchmarking analyses are the same – all five states fail.[267] Because the actual state-specific allocations are obviously somewhere between 0% and 100%, it is clear that Qwest's analysis would flunk a fully state-specific benchmarking analysis.

Given that the allocation of intrastate vs. interstate minutes does not change the results of the analysis, there is no legitimate reason to not rely on state specific minutes. As the Commission has explained, "UNE rates are set by state commissions based on state-specific costs divided by total demand. The UNE rates therefore necessarily reflect state-specific MOU and traffic assumptions. Use of state-specific MOU per-line and traffic assumptions to develop per-line per-month UNE-

[265] *See id.*
[266] *See Qwest July 22 Ex Parte Letter* at 3.
[267] *See* AT&T (Qwest II) Lieberman/Pitkin Dec. ¶¶ 8-20.

platform prices for a benchmark state and an applicant state is therefore consistent with the manner in which states establish the UNE-Platform rates."[268] These Commission findings unambiguously confirm that the use of state-specific minutes of use produce far more accurate benchmarking results than do standardized minutes. The Commission's benchmarking analysis is supposed to be an objective short cut test to assess whether an applicant state's rates fall within a reasonable range of TELRIC-compliance. Allowing the BOC to choose whichever set of minutes will allow it to defend the highest rates makes a mockery of the entire Section 271 applications process.

In any event, Qwest's claim that the Commission should abandon all state-specific data, and replace it with standardize data that even Qwest concedes – as it must – does not even come close to reflecting the actual number of minutes in any state covered by its application is on its face specious. To the extent that non-state-specific assumptions are necessary under either approach, common sense and basic mathematics dictate that a benchmarking analysis which starts with state-specific total minutes of use would more accurately reflect relative costs than an analysis that relies on *neither* state-specific total minutes, nor state-specific interoffice/intraoffice allocations.[269]

Qwest also has attempted to justify its use of national average minutes in its benchmarking analysis on the grounds that in some cases, the national average minutes data produce greater state-to-state cost-adjusted rate differences than would be produced by the state-specific data, and in other cases the national average minutes data produce lower state-to-state cost-adjusted rate differences than produced by the state-specific data.[270] Qwest has further pointed out that the relative difference in the national average and state-specific benchmarking analysis may vary from year to year (because the total number of minutes varies from year to year). But that is precisely why the more accurate state-specific data must be used – it would be entirely arbitrary to endorse Qwest's position that a

[268] *See New Jersey 271 Order* ¶ 53.

[269] *See id.* Qwest has also claimed that the fact that AT&T's benchmarking analysis fails to reflect state-specific allocations of minutes between originating and terminating calls, and between calls to an access tandem and calls direct to a POP. As explained in the testimony submitted by Mr. Lieberman in reply to that baseless claim, those allocations have little, if any, impact on the results of the benchmark analysis. *See* Lieberman (Qwest I) Reply Dec., n.1.

BOC can *choose* whichever data is most beneficial with respect to the particular states and at the particular times that the BOC chooses to file applications. And Qwest has clearly employed such gamesmanship here. Using state-specific minutes-of-use, and state-specific estimates for the allocation of those minutes shows that Qwest's Montana and Washington non-loop rates fail the Commission's nonloop benchmarking analysis.[271] On the other hand, Qwest's flawed non-loop benchmarking analysis – which is based on standardized minutes – produces distinctly more favorable results for Qwest.

Qwest's false claim that the use of standardized minutes to conduct a benchmarking analysis does not benefit Qwest also is irrelevant (in addition to being patently false). The purpose of the Commission's benchmarking analysis is to determine whether rates in a particular state are within some reasonable range of the rates in another state. The proper methodology for conducting that analysis does not depend on whether one methodology systematically produces higher or lower results than a competing methodology. Rather, the proper methodology is that which systematically produces the most accurate results. As recognized by this Commission in the *New Jersey 271 Order* (¶ 53), the most accurate benchmarking analysis is that which is based on state-specific minutes, and if necessary state-specific assumptions relating to the allocation of those minutes.

Transport And Tandem Switching. Qwest's benchmarking analysis also fails to account for the fact that the Commission's Synthesis Cost Model overstates transport and tandem switching costs in low density (*i.e.,* rural) areas compared to non-rural areas, thereby substantially overstating any cost justification for non-loop *rate differences*. This is a well known characteristic of the Commission's Synthesis Cost Model that AT&T has fully identified and explained in state proceedings.[272] For this reason, the Commission cannot rationally apply its benchmarking test to a

[270] *See Qwest July 22 Ex Parte Letter* at 3-5.
[271] AT&T (Qwest III) Lieberman/Pitkin Dec. ¶¶ 13.
[272] *See* AT&T (Qwest III) Lieberman/Pitkin Dec. ¶ 14. *Cf. Delaware/New Hampshire 271 Order* ¶ 47 (incorrectly implying that AT&T has advocated the use of the Synthesis Cost Model in state proceedings, without identifying the fact that the Synthesis Cost Model overstates Transport and Tandem Switching costs).

bundle of switching-related rates that includes transport and tandem switching. But that does not mean that the benchmarking analysis must be abandoned altogether. On the contrary, the Synthesis Cost Model is capable of comparing the relative costs of other non-loop rate elements (*i.e.,* the switch port, switch usage, switch features and signaling). Thus, the Commission still can conduct its benchmarking analysis based on these rate elements.

As demonstrated in the declaration of Michael Lieberman and Brian Pitkin, comparing the relative costs of other non-loop rate elements (*i.e.,* the switch port, switch usage, switch features and signaling) confirms that Qwest's Montana, North Dakota, Nebraska, Washington and Wyoming switching-related rates cannot be justified by a comparison to Qwest's Colorado rates. In Montana, North Dakota, Nebraska, Washington and Wyoming Qwest's switching rates (based on state-specific minutes) are 7%, 27%, 17%, 7% and 7% higher, on a cost adjusted basis, than those in Colorado, respectively.[273] Contrary to Qwest's claims, therefore, its switching rates in those states (and its non-loop rates in Montana and Wyoming) do not satisfy the Commission's benchmarking analysis. As the rates in those states are not based on TELRIC-compliant cost studies and therefore cannot be defended on their own merits, it should be clear that Qwest could not satisfy its Checklist Item 2 burden with respect to these states even if Colorado rates were valid benchmarks.[274]

[273] AT&T (Qwest III) Lieberman/Pitkin Dec. ¶¶ 20.

[274] In the *Delaware/New Hampshire 271 Order*, the Commission expressed concern that to address this problem it would have to re-examine the entire Synthesis Cost Model, which could not be done in the 90-day review period for a section 271 proceeding. That concern is misplaced. The Commission need not re-examine the Synthesis Cost Model to conduct a more reasonable benchmarking comparison. On the contrary, the Commission can conduct its benchmarking analysis using the non-loop rate elements, *excluding* the transport and tandem switching rate elements. Qwest has recently re-calibrated its rates in all eight of the benchmarked states based on that very analysis. The Commission also noted in the *Delaware/New Hampshire* order, that it is permitted to implement a short-cut methodology that compares bundles of rate elements. That argument misses the point. To be sure, to the extent that an applicant has shown that it has allocated costs among different rate elements in a reasonable manner, a benchmark comparison using a bundle of those rates may be appropriate. But that does not mean that it is appropriate for the Commission to base its benchmarking analysis of a bundle of elements that includes elements that the Commission's Synthesis Cost Model cannot accurately compare. A benchmarking analysis that includes such rate elements is meaningless, because that analysis would not accurately estimate the cost differences (and therefore cannot determine what levels of rate differences are cost justified).

C. Qwest's UNE Rates Create a "Price Squeeze" That Precludes Competitive Entry.

Section 271 bars the Commission from granting Qwest long distance authority unless the Commission finds that the UNE rates are "nondiscriminatory" as well as cost-based.[275] The Supreme Court has held that even if a utility's wholesale rates are within the range of reasonable cost-based rates, the rates are "discriminatory" and "anticompetitive" if they fall at the high end of that range and if they preclude wholesale purchasers from economically competing with the utility's retail services to any class of customers.[276] Thus, if Qwest's high end UNE rates foreclose UNE purchasers from economically providing residential competition, Qwest is engaged in "discrimination" and has not satisfied checklist item two. And because Section 271 categorically bars long distance authorization unless checklist item two has been "fully implemented," to the extent that Qwest's UNE rates in any state are discriminatory, the Application must be denied.

In the recent *Delaware/New Hampshire 271 Order* (¶ 94), the Commission stated that "Section 252 of the Act requires that UNEs be priced on the basis of cost, and our analysis of Verizon's Delaware UNE rates determined that these rates are cost-based. The potential revenues that can be generated from purchasing UNEs, and the resulting margin, are irrelevant to the determination of whether rates are cost-based." But that statement does not come to grips with the Supreme Court's express finding that rates are "discriminatory" and "anticompetitive" if they fall at the high end of a cost-based range (even if rates are within that range) and if they preclude wholesale purchasers from economically competing in the retail services markets.[277] Thus, to the extent that Qwest's UNE rates foreclose UNE purchasers from economically providing residential competition, that evidence must at least be considered when making an assessment of whether Qwest' rates are discriminatory in violation of Checklist Item 2.

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[275] *See* 47 U.S.C. §§ 252(d)(1), 271(c)(2)(B)(ii) & (d)(3)(A).
[276] *FPC v. Conway Corp.,* 426 U.S. 271, 278-79 (1976).
[277] *Id.*

As demonstrated in the attached declaration of Messrs. Lieberman and Pitkin, a properly conducted margin analysis shows a residential entry strategy that employs a combination of UNE-based and resale entry (the analysis assumes that a UNE-based approach where that is the most profitable entry mode, and a resale-based approach where that is the most profitable mode of entry) is *not* economically feasible in Idaho, Iowa, Montana, or Washington. State-wide average *gross* margins (not accounting for carriers' internal costs) in those states are only $5.38 (Iowa), $6.52 (Idaho), 6.28 (Montana) and $.76 (Washington).[278]

To determine whether those margins are sufficient to support entry, it is necessary to estimate and efficient carrier's internal costs. All carriers incur internal costs. Those costs include the costs associated with customer support, billing and collections, advertising and marketing, general administration, and uncollectibles. The only evidence in the record estimating an efficient carrier's internal costs are those provided by AT&T's vice president of finance, Mr. Bickley. And Mr. Bickley estimates those costs exceed $10.00 per month.[279] Thus, margins available to new entrants in Idaho, Iowa, Montana, and Washington are not sufficient to cover an efficient new entrant's internal costs of entry.

Qwest has in the past questioned whether the internal cost estimates provided by AT&T's expert witness are accurate. Tellingly, however, Qwest has *not* submitted any evidence that contradicts AT&T's internal cost estimates. Absent contrary evidence, there can be no reasoned finding that an efficient carriers internal costs are below those estimated by AT&T. The bottom line is this: Mr. Bickley's estimates of an efficient carrier's internal costs are not only reliable, but are the only estimates available to this Commission. On this record, the Commission cannot give any weight to Qwest's unfounded insinuations that Mr. Bickley's estimates are flawed.[280]

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[278] AT&T (Qwest III) Lieberman/Pitkin Dec. ¶ 46.

[279] AT&T (Qwest I & Qwest II), Bickley Declarations.

[280] As demonstrated by AT&T in response to the Qwest II 271 application, local entry in Wyoming and Montana also is foreclosed by Qwest's anticompetitive deaveraging methodology. Qwest and the state commissions in Wyoming and Montana implemented a deaveraging methodology that makes it virtually impossible for potential entrants to determine (continued)

V. QWEST DOES NOT PROVIDE REASONABLE AND NONDISCRIMINATORY ACCESS TO INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, AND RESALE.

Qwest's nine-state application also fails because, as AT&T previously showed, Qwest does not provide reasonable and nondiscriminatory access to interconnection, unbundled network elements, and resale as required by the competitive checklist.[281] Since AT&T's previous showing, Qwest has modified its practices in only one respect.[282] Qwest's continuing failure uniformly and fully to comply with its checklist obligations requires denial of its application.

For example, as AT&T demonstrated, Qwest is denying interconnection on reasonable terms and conditions in several respects. In all nine states, Qwest imposes unreasonable and non-cost-based "entrance facility" charges on CLECs that wish to interconnect at a Qwest tandem or end office switch, which anticompetitively drives up the cost of interconnection. Also in all nine states, Qwest imposes substantial and discriminatory financial penalties on CLECs that fail to meet Qwest's arbitrary 50 percent trunk utilization requirement – a requirement Qwest itself does not meet and for which Qwest suffers no comparable consequences. In all states but Colorado and Washington, Qwest further restricts efficient interconnection by barring CLECs from placing interconnection traffic on existing trunk groups that carry interLATA traffic. And in all states except Montana, Qwest arbitrarily limits the length of interconnection trunks it will construct to 50 miles. As AT&T has

which customers are located in which UNE rate zones. Consequently, potential new entrants must request that information from Qwest on a customer-by-customer basis. This problem inhibits local entry in two ways. First, because the revenues available to new entrants varies widely from UNE zone to UNE zone, the inability to determine which potential customers are located in which UNE zone (except on a case-by-case basis) makes it difficult, if not impossible, to develop and implement and effective entry strategy. Second, because Qwest knows exactly where CLECs intend to enter – indeed, CLECs must request customer UNE zone information directly from Qwest – Qwest has the anticompetitive incentive and ability to misuse this highly sensitive business plan information to target CLEC customers. *See* AT&T (Qwest II) Pitkin/Lieberman Dec. ¶¶ 56.

[281] *See* AT&T (Qwest I) at 71-106; AT&T (Qwest II) at 96-121.

[282] As explained in the Addendum to Qwest's application, Qwest has now modified its policy on when unbundled switching is available, in an acknowledgement that the Commission's recent *Virginia Arbitration Order* demonstrated beyond doubt that Qwest's previous policy was unlawful. *See Virginia Arbitration Order* ¶¶ 360-63.

demonstrated, each of these violations hinders facilities-based entry by driving up the costs of using facilities to interconnect with Qwest's network.[283]

Qwest also denies nondiscriminatory access to unbundled network elements. As AT&T demonstrated, Qwest's policies are discriminatory with respect to (1) building new facilities to serve customers: (2) access to the network elements of Qwest's affiliates; and (3) combining network elements with telecommunications services.[284] Qwest does not provide nondiscriminatory access to transport (because of its unlawful "Extended Unbundled Dedicated Transport" charge), dark fiber, or the NID.[285] And Qwest has refused to make DSL services available for resale on reasonable and nondiscriminatory terms and conditions.[286] For all of these reasons, Qwest has not demonstrated compliance with the competitive checklist, and therefore its renewed application must be denied.

VI. QWEST'S PROVISION OF INTERLATA SERVICE IS NOT IN THE PUBLIC INTEREST.

The record in this proceeding precludes any finding that granting the Qwest III Application is consistent with the public interest. At the heart of the public interest inquiry, as Congress conceived it and as this Commission has explained, is a determination of whether, notwithstanding checklist compliance, Qwest has fully and irreversibly opened its local markets to competition.[287] As AT&T has demonstrated from the beginning of Qwest's multi-state assault, Qwest has engaged in a pattern of discriminatory and anticompetitive conduct that precludes any finding that Qwest's local markets are, and will remain, open to competition. Indeed, as time has passed, Qwest's ongoing anticompetitive and unlawful actions have multiplied and spawned new and more serious concerns every day. Almost inconceivably, Qwest actions illuminated *in the few days between the time it*

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[283] *See* AT&T (Qwest I) at 71-81; AT&T (Qwest II) at 99-106.
[284] *See* AT&T (Qwest I) at 81-91; AT&T (Qwest II) at 106-111.
[285] *See* AT&T (Qwest I) at 99-107; AT&T (Qwest II) at 114-119.
[286] *See* AT&T (Qwest I) at 104-106; AT&T (Qwest II) at 119-121.
[287] *See Texas 271 Order* ¶ 431.

withdrew its first applications and now conclusively refute Qwest's claim that it is, and will remain, committed to accelerating and completing the process of opening its local markets to competition.

As the Commission has recognized, if Qwest "has engaged in discriminatory or other anticompetitive conduct, or failed to comply with State and federal telecommunications regulations," it can be denied Section 271 authority because the market-opening provisions of the 1996 Act "depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECS with their statutory obligations."[288] While the Commission has stated that it "will not withhold Section 271 authorization on the basis of isolated instances of allegedly unfair dealing or discrimination," it has indicated that it will take such action where, as here, "a pattern of discriminatory conduct" exists that undermines its confidence that the relevant "local market is open and will remain so" after the grant of Section 271 authority.[289] In this era of concern for corporate responsibility and compliance with the market-opening provisions of the Act, now is not the time for silently sweeping the clear warning of the *Michigan 271 Order* under the carpet. As Chairman Powell recently admonished another BOC that "broke the law in five different states" by failing to follow the Act with respect to its competitors, "unlawful, anti-competitive behavior is unacceptable."[290] Qwest, like that BOC, has "withheld and litigated, forcing competitors to expend valuable time and resources to exercise their rights" under the Act and the FCC's rules, and the Commission must not "hesitate to act to ensure that consumers are protected and the public interest is advanced."[291] Indeed, no time and case has better invoked the Commission's conviction that it should withhold a grant of authority under section 271 in the presence of a pattern of

[288] *Michigan 271 Order* ¶ 397.

[289] *See Michigan 271 Order* ¶¶ 391, 397; *Texas 271 Order* ¶ 431; York 271 Order ¶ 431, 444.

[290] News Release, *FCC Fines SBC Communications, Inc. $6 Million For Violations Of Commission Merger Condition*, Statement of Chairman Michael Powell, released October 9, 2002.

[291] *Id*.

discriminatory conduct than Qwest's conduct: Qwest's tradition of violations and anticompetitive conduct has been adjudicated paramount and its relentlessness appears more evident each day.

Specifically, in its comments on Qwest's first section 271 application, AT&T demonstrated that Qwest and its predecessor US WEST had engaged in a pervasive effort to forestall competition in its local exchange markets at the same time that it launched illicit efforts to provide service across LATA boundaries.[292] AT&T documented that in a variety of states and in a variety of ways, Qwest had inhibited local entry by, among other things, refusing to permit UNE-P testing and to provide access to inside wiring in multiple dwelling units.[293] At the very same time, Qwest entered patently discriminatory secret interconnection deals in violation of sections 251 and 252; as part and parcel of these discriminatory efforts, it attempted to evade informed state commission and FCC review of its compliance with Section 271 checklist requirements by purchasing with these secret discriminatory deals the silence of complaining CLECs.[294] And as AT&T has catalogued, Qwest simultaneously engaged in effort after effort to circumvent the restrictions against its provision of interexchange service, from its failed Arizona InterLATA gambit, through its adjudicated violations of Section 271, to its ongoing use of "lit-fiber capacity IRUs" and "corporate communications" to avoid compliance with those restrictions.[295]

While the size and severity of these anticompetitive actions was startling from the outset, after the filing of its first section 271 applications, the "public interest" problems in which Qwest embroiled itself seemed to swell on almost a daily basis. For example, while Qwest's applications were pending at the FCC, both the ACC staff and the IUB issued reports and orders that confirmed that Qwest had unlawfully failed to file discriminatory interconnection agreements that, among other things, improperly purchased CLEC silence during the state section 271 process. Moreover, the

[292] AT&T (Qwest I) at 131-159.
[293] *Id*. at 133-147.
[294] *Id.* at 17-30, 134-136.
[295] *Id*. at 138-144.

numerous federal investigations into Qwest's accounting and other disclosure practices revealed new misconduct that was tied unalterably to its unlawful provision of long distance service. AT&T, and others, had demonstrated that Qwest's sales of "lit fiber capacity IRUs" constituted the provisioning a long distance services in violation of section 271.[296] Although Qwest had claimed that these IRUs constituted the "sale" of long distance assets, and therefore not prohibited interexchange services, in July of this year, it was forced to acknowledge accounting irregularities that suggest just the opposite.[297] Indeed, Qwest was forced to concede that its accounting records, practices and policies "did not comply with the requirements of GAAP," and that the statements in its first section 271 applications to the contrary were not true.[298] Because Qwest was not in a position to "certify" that its "financial statements are accounted for in a manner consistent with GAAP,"[299] it eventually was forced to withdraw its applications for Section 271 authority.

Qwest has quickly filed its section 271 application for all nine states anew, and the anticompetitive baggage Qwest carries has, without question, increased. As discussed above, subsequent to the withdrawal of its applications covering the nine states, an administrative law judge in Minnesota concluded not only that Qwest violated sections 251 and 252 in entering its secret deals, but that Qwest's violations were "knowing and intentional."[300] The Minnesota ALJ also found that Qwest violated sections 251 and 252 by entering into an *oral* agreement with McLeod in order to circumvent the core principles that underlie sections 251 and 252, in the process purchasing McLeod's silence in state proceedings.[301] Indeed, as evidence of Qwest's intentional anticompetitive conduct, the ALJ held that while McLeod requested that Qwest put the agreement in writing, Qwest

[296] AT&T (Qwest I) Comments at 143-144; CompTel (Qwest I) Comments at 7-13; Touch America (Qwest I) Comments at 13-19. Qwest's IRUs are virtually indistinguishable from private line services, and Qwest has aggressively marketed them to "winback" private line customers that it was required to divest in connection with the US WEST merger.

[297] *See* AT&T (Qwest II) Reply, at 43.

[298] *See* Letter from Oren G. Shaffer (Qwest) to Marlene H. Dortch (FCC Secretary), WC Docket Nos. 02-148 & 02-189 (filed August 20, 2002).

[299] *See id.*

[300] Minnesota ALJ Decision at 53.

refused to do so because "other CLECs might feel entitled to the same discount if the agreement were written and made public."[302] The Minnesota ALJ indicated that Qwest dissembled in its effort to deny the existence of, and intention behind, this secret deal, expressly finding "not credible" the testimony of Qwest's witness that Qwest did not enter into the discount agreement; the ALJ noted that Qwest's witness "would not directly answer questions" and that her testimony was contradicted by contemporaneous documents.[303] In addition, the ALJ found that Qwest "intentionally structured agreements to prevent their disclosure as filed interconnection agreements," showing a clear disregard for the mandates of sections 251 and 252.[304]

And so it is only slightly shocking that, as described above, Qwest now can be shown to have intentionally concealed from CLECs crucial information and abilities that Qwest itself uses to compete in its local markets. Qwest not only has refused to provide services regarding local loop data collection (MLT) to its CLEC competitors at the same time that it has used that ability to further the efforts of its own affiliates, it has made efforts to prevent others, including regulators, from discovering the extent of the availability of that ability. In sharp contrast to the Act's requirement that a BOC be committed to open its local markets to competition, the facts reveal that Qwest has become committed to practices that evidence disdain for "sharing, as the law requires."[305]

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[301] *Id.* at 43-46. The net effect of this agreement was to change "all of the prices in McLeodUSA's interconnection agreement, including those set by the Commission in lengthy cost docket proceedings." *Id*. at 46.

[302] *Id.* at 44.

[303] *Id.* at 46. The ALJ also found that Qwest offered Eschelon financial incentives to "withhold information from regulators that may be relevant to Qwest's section 271 applications," and "covertly assist Qwest in manipulating various regulatory proceedings." *Id*.

[304] *Id.* at 52. To compound the clarity of Qwest's malfeasance, the ALJ found that "Qwest has a history of past violations," indicating that Qwest "tried to avoid its § 252 obligations" in two PUC dockets and "engaged in a pattern of anticompetitive behavior" that had been demonstrated in an earlier proceeding by AT&T.

[305] News Release*, FCC Fines SBC Communications, Inc. $6 Million For Violations Of Commission Merger Condition*, Statement of Chairman Michael Powell, released October 9, 2002. Of course, the new information Qwest puts forward in the Qwest III Application with regard to compliance with Section 272 shows a similar disregard for the mandate that the books, records and policies of a section 271 affiliate be GAAP compliant. At the same time that Qwest must acknowledge that it cannot certify that its out-of -region long distance subsidiary complies with Section 272, or that its parent has policies, practices and records that are GAAP compliant, Qwest seeks a grant of section 271 authority for a newly-formed long distance entity that without question stands as nothing more than a temporary shell game in the section 271 application process.

Where the facts, both adjudicated and alleged, demonstrating Qwest's hostility to the "market-opening" provisions of the Act have accumulated with the passage of time rather than abated, it is difficult to imagine a more compelling "public interest" case for the denial of Section 271 authority. Qwest's conduct in entering secret interconnection agreements, evading the requirements of section 271, and inhibiting the entry of competitors to its markets through delay, denial, and dissembling cannot be the subject of a cavalier referral to another proceeding on another day. In this time of national resolve to establish and mandate corporate responsibility and effective government oversight, the Commission must find the resolve to deal squarely and forthrightly with Qwest's malfeasance. Qwest has attempted to thwart competition with the hope that any long-delayed sanction will be a trivial cost of doing illicit business. The Commission must not grant Qwest Section 271 interLATA authority and reward this strategy.

Entry into many Qwest states is further deterred because, as noted above, Qwest's UNE rates create a price squeeze. Indeed, state-wide average *gross* margins (not accounting for carriers' internal costs) in Iowa, Idaho, Montana, and Washington are only \$6.22, \$7.53, 7.33 and \$8.28, respectively. And as explained above, AT&T has demonstrated – and Qwest has provided no evidence to the contrary – that an efficient carrier's internal costs of entry exceed \$10.00. Thus, it is clear that it is not economically feasible for carriers to provide service in these states.

Congress adopted Section 271 in order to assure that BOCs could not provide long distance service at a time when their local monopolies would give them an "unfair advantage" over long distance competitors in, inter alia, providing "combined packages" of local and long distance service to customers who desire "one-stop shopping."[306] If, by contrast, long distance entry were allowed before other carriers could provide competing combined packages, it would "threaten competition" in both the local and the long-distance markets by granting the BOC a monopoly in the provision of

[306] *AT&T* v. *Ameritech*, 13 FCC Rcd. 21438, ¶¶ 5, 39 (1998), *aff'd sub nom. U S WEST* v. *FCC*, 177 F.3d 1057 (D.C. Cir. 1999).

such combined services.[307] Thus, the price squeeze that exists in several Qwest states confirms that a grant of Qwest's application plainly would be contrary to the public interest.

Partly as a result of Qwest's patently unlawful conduct and the price squeeze, CLEC entry into the Qwest region has been very limited. According to Qwest's own data, UNE-based CLECs serve fewer than 3% of *all* lines Colorado (2.77%), Idaho (2.08%), Nebraska (0.94%), Montana (1.06%), Utah (1.80%), and Washington (1.86%).[308]. And competition for residential consumers is virtually non-existent. Less than ½ of 1% of residential lines are served by facilities-based competitors in Idaho (0.12%), North Dakota (0.35%), and Wyoming (0.39%).[309] And fewer than ½ of 1% of lines are served by UNE-P based competitors in Colorado (0.48%), Idaho (0.01%), Nebraska (0.41%), Montana (0.01%), Utah (0.02%), and Washington (0.10%).[310]

As bad as these static figures are, the trends are even worse and particularly telling. For example, Qwest's "updated" entry statistics show that between March 31, 2002 and July 31, 2002 – only four months – the number of residential lines served via UNE-P *decreased* in Colorado (50.67%), Idaho (12.20%), and Nebraska (3.07%) (on an annualized basis, that is a decrease of 88%

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[307] *Id*. ¶ 5.

[308] *See* Attachment 3, hereto. These values are based on Qwest's reported local interconnection service ("LIS") trunk data. Qwest III, Teitzel Dec. As demonstrated by AT&T in response to Qwest's first two applications, the LIS entry statistics cited by Qwest are overstated, because Qwest, in order to estimate facilities-based lines serviced by CLECs, multiplies the number of LIS trunks by a factor of 2.75. *See id*. But the Department of Justice has explicitly rejected a 2.75 multiplier. DOJ Texas Eval. at n.15 (February 2000). The Department of Justice instead has advocated a "more reasonable multiplier . . . close to one." *Id.* AT&T has made this adjustment to Qwest's LIS data, and the entry statistics cited herein are based on those corrected values.

[309] *See id.*

[310] *See id.* Qwest also lists entry statistics based on an E911 database. *See* Teitzel Qwest III Dec. But as demonstrated by AT&T in response to Qwest's first two applications, CLEC line counts based on E911 data are inaccurate for multiple reasons. For example, AT&T's protocol is to report to the E911 database *every* telephone number behind a PBX switch, including direct inward dial ("DID") numbers, when a customer migrates from an ILEC to AT&T. Because AT&T does not know which ported telephone numbers are DID numbers, AT&T routinely loads *all* telephone numbers into the E911 database to ensure that the database includes all lines that are necessary for prompt emergency response. This practice results in the E911 database including a substantially larger number of telephone numbers than the actual facilities needed to provide the service. *See* AT&T (Qwest II) at 148. Area code overlays can also cause CLEC lines to be overstated, because in such circumstances CLECs often load numbers from *both* area codes into the E911 database to ensure emergency response. *See id.* Further , ILECs and CLECs follow a wide variety of methods when submitting numbers to the E911 databases, and as a result the E911 databases do not provide a more accurate count than the Commission's Form 477 information, in which all parties follow the same methodology. *See id.*

in Colorado, 32% in Idaho, and 9% in Nebraska).[311] The number of UNE-P lines overall also dropped in Idaho (8.07%), Iowa (10.49%), Nebraska (8.79%), North Dakota (5.06%), Utah (11.39%), and Wyoming (1.52%) (on an annualized basis that is a decrease of 22% in Idaho, 28% in Iowa, 24% in Nebraska, 14% in North Dakota, 30% in Utah, and 4% in Wyoming).[312] On this record, there can be no reasonable finding that the miniscule amount of entry in the states covered by Qwest's application signals that entry in these states is "irreversibly" open to competition. On the contrary, in many of these states, the tiny amount of entry that has occurred already is reversing itself – likely in response to the myriad anticompetitive tactics employed by Qwest.[313]

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311 *See* Attachment 3, hereto.

312 *See Id*.

313 Qwest urges the Commission to make any order approving its application immediately effective. Because the application must be denied on myriad grounds the Commission need not reach this issue. In any event, Qwest is seeking special treatment that the Commission has not afforded other section 271 applicant. In granting section 271 applications, the Commission routinely implements an "effective date" that is nine or more days later than the date of the approval order. *See, e.g., NY 271 Order* ¶ 458 (11 days); *TX 271 Order* ¶ 439 (11 days); *KS/OK Order* ¶ 26 (43 days); *NJ 271 Order* ¶ 193 (9 days); *GA/LA 271 Order* ¶ 311 (9 days). That practice serves the important purpose of allowing interested parties time to seek a stay of the approval order *before* the applicant begins providing long-distance service. In addition, the "effective date lag" deters applicants from prematurely marketing long-distance service before receiving section 271 approval. *See, e.g., NJ 271 Order* 188-190. Qwest has provided no reason for the Commission to treat Qwest's application differently from prior applications by permitting Qwest to provide long-distance service on the day that it receives section 271-approval.

CONCLUSION

For the foregoing reasons, Qwest's second application for authorization to provide in-region, interLATA services in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming must be denied.

Respectfully submitted,

/s/ Mark C. Rosenblum

Mark C. Rosenblum
Lawrence J. Lafaro
Richard A. Rocchini
900 Route 202/206 North
Room 3A227
Bedminster, NJ 07920
(908) 532-1839

Mary B. Tribby
AT&T Communications of the Mountain States, Inc.
1875 Lawrence Street, Room 1575
Denver, Colorado 80202
(303) 298-6163

David W. Carpenter
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

Mark E. Haddad
SIDLEY AUSTIN BROWN & WOOD, L.L.P.
555 West Fifth Street
Los Angeles, California 90013
(213) 896-6000

David L. Lawson
Mark D. Schneider
R. Merinda Wilson
James P. Young
C. Fredrick Beckner III
Richard E. Young
Christopher T. Shenk
SIDLEY AUSTIN BROWN & WOOD, L.L.P.
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

Attorneys for AT&T Corp.

October 15, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 15st day of October, 2002, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: October 15, 2002
Washington, D.C.

/s/ Peter M. Andros
Peter M. Andros

SERVICE LIST

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554*

Qualex International
Portals II
445 12th Street, SW, Room CY-B402
Washington, D.C. 20554

Janice Myles
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554*

Steve Vick
Montana Public Service Commission
P.O. Box 202601
Helena, MT 59620*

Julie Orchard
Public Service Commission
Heber M. Wells Building
Fourth Floor
160 East 300 South
Salt Lake City, UT 84111*

Carole J. Washburn
Washington UTC
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250*

Stephen G. Oxley
Wyoming Public Service Commission
2515 Warren Avenue, Suite 300
Cheyenne, WY 82002*

Ryan Harsch
U.S. Department of Justice
Antitrust Division
Telecommunications and Media
Enforcement Section
1401 H Street, NW, Suite 8000
Washington, D.C. 20530*

Peter A. Rohrbach
Mace J. Rosenstein
Linda L. Oliver
David L. Sieradzki
Hogan & Hartson
555 13th Street, NW
Washington, D.C. 20004

Bruce Smith
Colorado Public Utilities Commission
Logan Tower Office Level 2
1580 Logan Street
Denver, CO 80203*

Jean Jewell
Idaho Public Utilities Commission
P.O. Box 83720
Boise, ID 83702*

Penny Baker
Iowa Utilities Board
350 Maple Street
Des Moines, IA 20319-0069*

Chris Post
Nebraska Public Service Commission
300 The Atrium
1200 N Street
Lincoln, NE 68508*

Patrick J. Fahn
North Dakota Public Service
Commmission
600 East Boulevard, Dept. 408
Bismarck, ND 58505-0480*

* Delivered electronically